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ABSTRACT

Meant to help both employees and employers avoid problems by generally explaining the law of the workplace and suggesting places to turn for further information concerning particular situations, this booklet is presented in a question/answer format. The areas covered and their subtopics are as follows: (1) recruiting and hiring; (2) employees' rights and responsibilities on the job--wages and hours, job safety, employee privacy, unions and collective bargaining, discrimination, unique rights of government employees, and performance reviews and discipline; (3) out of work--job security, unemployment benefits, social security disability, workers' compensation, special disability plans; and (4) planning for retirement--social security, pension plans. The booklet concludes with a section on where to get more information. (JB)

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Introduction

Just about every aspect of work is affected by the law. In earlier times the workplace was pretty much unregulated. Today, state and federal laws set the ground rules for worker and boss alike.

The law helps guide and shape the relationship between employer and employee. This doesn't mean the law should decide every question. An expensive lawsuit isn't the best way to solve problems on the job. If problems arise, employers and employees should first try to settle differences through discussion and compromise. Many employers practice "preventive law" by anticipating problems before they occur and trying to resolve employee problems in a constructive way.

This booklet is meant to help both employees and employers avoid problems by generally explaining the law of the workplace and suggesting places to turn for further information concerning a particular situation. The booklet format gives a brief explanation of a particular area of law and then answers questions often asked by employees and employers.

Q. Is there a single law of the workplace?
A. No. There is no single "Law of the Workplace." The law of today's workplace comes from a patchwork of federal and state statutes, employment contracts, collective bargaining agreements, state and federal case law, company personnel handbooks, civil service rules, and employer practices.

Q. Will this book provide answers to specific problems for the employee or employer?
A. This booklet should be viewed as a basic road map rather than as a source of advice on a particular legal matter between employers and employees. No book this size can cover every situation or give you specific advice on your particular problem. It will direct you to further information.

Q. Does it make a difference if one works for state or local government rather than a private employer, and are there other distinctions to keep in mind?
A. Yes. This is a key distinction. Generally, the employment relationship between a private employee and employer is governed by contract and to an extent by federal and state law; the private employer has more latitude than a public one. The employment relationship between a public employee and employer is highly regulated by law, including civil service regulations, municipal ordinances, state and federal constitutions and statutes.

Another factor is whether the employee/employer relationship is covered by a collective bargaining agreement. If so, the union is the employee's bargaining representative and he or she receives the benefits and protections of the union contract with respect to salaries and work conditions. If not, the employee deals directly with the employer and can, to some extent, individually bargain conditions of employment. State and local government employee unions/employers are generally governed by state laws; while private unions/employers are generally covered by federal labor laws which apply in all states.

Q. Does the booklet cover independent contractors?
A. No. This book deals only with the relationship between employers and employees and does not address self-employed people or "independent contractors" who agree to do a job for a sum of money but are not considered employees. Suppose ABC Company retains Jill as an independent contractor to put up a fence for $1,000; ABC does not supervise Jill's work and is only interested in getting the fence built. Jill wants profits, not wages and benefits. Her relationship with ABC ends after the job is done. This book applies to the relationship between ABC and its employees or Jill and her employees. It doesn't apply to the relationship between ABC and Jill, the independent contractor.

The First Step: Recruiting and Hiring 1

The hiring process is very much affected by laws prohibiting discrimination. Federal law and many states prohibit discrimination on the basis of race, color, national origin, sex, pregnancy, religion or age. Federal laws also prohibit discrimination against veterans. Under the federal law, the handicapped are protected against discrimination by federal agencies, entities receiving substantial federal money, and those having grants or contracts of designated financial amounts with the federal government. Some state and local governments prohibit discrimination on account of marital status, sexual orientation and handicaps.

Hiring is affected in other ways. The federal government and many state and local governments have: established "merit selection" for jobs, with tests and objective standards for hiring to avoid political patronage; adopted laws regulating the hiring of young people; and adopted or are considering laws dealing with referrals and background checks, lie detectors, and drug testing.

Q. A company is expanding and needs to hire 20 more salespeople. What rules apply to job ads?

A. The main idea is avoiding illegal discrimination. Ads should appeal to all qualified applicants and should avoid words indicating a preferred race, sex or age of applicants. To emphasize this, some ads say "salesperson" instead of "salesman." Using the phrase "An Equal Opportunity Employer" in the ad tells all qualified applicants that they will be given equal consideration.

Q. Suppose a company really needs a young, male employee?

A. If you put such a qualification in an ad, be prepared to justify it as necessary for the position. The courts are very skeptical of stereotyped job qualifications

and place a heavy burden of justification upon the employer. In the majority of cases each applicant must be individually evaluated to see if he or she meets the requirements.

A very limited exception exists where an applicant's age, sex, religion, or national origin is a "bona fide occupational qualification" (BFOQ) for a particular job. For example, a filmmaker may cast only women in female parts. Currently, the courts vary on limiting the BFOQ exception. Age restrictions which were considered BFOQs for safety reasons (such as a mandatory retirement age for airline pilots and police) have been declared illegal in some cases; other courts have allowed such restrictions to stand.

Q. Some employers get applicants by word-of-mouth, especially by talking to present employees. Is there anything wrong with this?
A. That depends on the composition of the employer's work force. If the work-force is predominantly white, as are the referrals, there may be an unintentional pattern of discrimination. The same can be said of employers who rely heavily upon recruiting relatives of current employees who are predominantly white males.

The best way for employers to avoid these problems is to use widespread advertisements or notices which reach all types of people in the community. An employer should make every reasonable effort to make as many qualified persons as possible aware of the job and to ensure that each applicant understands that his or her application will be given equal consideration.

Q. Are formal recruiting methods helpful to employers?
A. Yes. Using employment agencies or visiting schools will help make sure your recruiting reaches a variety of persons, including minorities. Make sure that any employment agency is aware of your equal employment opportunity policy and that the agency itself does not discriminate. If you visit schools, choose ones which offer the training students need for your jobs. As an affirmative measure, it can be helpful to visit some minority schools that provide the training your company needs.

Q. Now that people are applying for the job, how can an employer ensure nondiscriminatory hiring?
A. It is helpful to have a standardized application form that avoids unnecessary questions. Questions about age, height, weight, marital status, level of education, arrest record, or a handicap must be job-related. For example, questions about height and weight which are not job-related could single out women or members of certain ethnic groups, who are usually smaller. Likewise, questions about marital status in combination with other factors may raise an inference of sex discrimination. Job relevancy is the key here. If an application question requests information that is unnecessary in the hiring decision, why have it unless there is some "other reason"...perhaps perceived as an unlawful one.

Q. What about personal job interviews?

A. Job interviews tend to be subjective, but the interview procedure should be as uniform and objective as possible. An employer should ask questions related to job qualifications, provide a checklist for interviewers to follow and rate applicants systematically and consistently.

Q. May an employer administer a lie detector test to find out whether the applicant is honest?

A. This whole area of the law is rapidly changing. Federal restrictions on polygraph tests have been proposed, but as yet not adopted. Currently, lie detectors are permitted by federal law as long as applicants are judged on the basis of whether or not they lied during the test, and not on information derived from it (such as whether they were ever arrested).

Employers who use lie detectors should test all applicants equally. Be careful of questions like "Are you a union member?" If the person is not hired, there could be a valid charge of discrimination because of membership in a union. Careless distribution of test results could lead to libel or slander claims. See page 23 for more on these tests.

Many states have passed their own laws limiting the use of polygraphs and other "truth testing" procedures. Employers should be sure that these tests have not been restricted by state law. This information may be available from a state civil rights agency or labor department. If an employer does have a pre-employment polygraph procedure, it should be administered to all applicants on an equal basis. Disparity in the administration of the test can lead to discrimination charges.

Q. Is a bad reference from a former employer an acceptable reason for not hiring an applicant?

A. A valid and truthful disclosure in a bad reference could be grounds for rejecting an applicant. However, references should not be taken at face value.

Some states have passed laws requiring that employees have access to personnel files and written notice of any reference given to others. Some employees have claimed that references slandered them. These developments make it more difficult to obtain an open and complete evaluation from a former employer. Good sense and thorough checking are the watchwords here.

Q. Can an employer run a background check on an applicant?

A. Extensive background checks are sometimes necessary for certain jobs. Examples would be those involving security or trade secrets. Checks should be made fairly, non-discriminatorily, and be related to the job requirements.

Q. Can a test be used to screen applicants?

A. The test should be job-related. Sometimes a test may have an unlawful "adverse impact" on minorities, even where the test seems to be neutral. Thus, a

disproportionate number of minorities are denied jobs. For example, a test of English language skills might tend to disqualify a comparatively greater number of Hispanics or others of bilingual, ethnic background. If the test forms the basis for hiring, it then works to exclude them from the employer's workforce. Unless English is a necessary job qualification, the test could be unlawful.

Many federal regulations cover the subject; federal guidelines say a testing procedure has an adverse impact if the pass rate for minorities (including women) is less than 80% of the pass rate of white men. If the pass rate among white male test takers is 50%, then the pass rate among minorities must be at least 40% or the test is considered suspect. Employers should conform to these federal rules when designing job tests.

Q. Can medical exams or drug tests be required of applicants?
A. Yes. As long as the results are kept confidential and are not used to discriminate against minorities, federal law allows them. State laws also regulate this area. A public employer—a school system or government agency—may have additional considerations involving constitutional and statutory privacy rights of applicants.

Q. With all these restrictions, does an employer really have the right to set basic job qualifications and work standards?
A. Certainly. Employers have the right to set job qualifications which do not discriminate against the protected classes mentioned above. If the qualifications are job-related, they will be lawful even if unintended discrimination results, as long as the employer can show business necessity. Thus, experience requirements, specific skill levels and dress code standards (applied to men and women equally) are generally valid.

Q. Can you give an example of qualifications which are discriminatory because of their impact?
A. One is requiring a high school education which is not necessary to the job. Such a requirement could disproportionately disqualify minorities and therefore be discriminatory. Excluding single parents with young children may have a discriminatory impact on women. There may be discrimination if an employer requires all employees to speak English in a job involving only the ability to do physical labor.

Q. If an employer has a business contract with the government will it affect hiring policies?
A. If the contract is for $10,000 or more, employers are required by Executive Order 11246 not to discriminate on the basis of race, color, religion, sex, or national origin; if it is for more than $50,000 and at least 50 workers are employed, a written affirmative action plan is required which sets goals for the employment of minorities and women in job categories in which they are "un-

derutilized." Also, under the federal Rehabilitation Act, federal contractors must set goals for the employment of qualified handicapped persons.

Unless an employer has someone in the company with experience in this area, it is a good idea to get help in establishing an affirmative action plan and meeting the reporting obligations. Affirmative action is discussed in more detail on pp. 35–38.

Q. When does a job applicant need a license as a prerequisite for a job?
A. State and federal regulations can restrict some kinds of employment to persons who are licensed by the state. Typical jobs include cosmetologists, barbers, electricians, heating/air conditioning technicians, engineers, nurses, builders, lawyers, accountants, dental hygienists, and physicians. If you are considering such an occupation you should check with the licensing authorities in your state to see what requirements apply to the field.

Q. What restrictions would apply to hiring a 16 year-old?
A. Every state, like the federal government, has laws regulating the type of work available to workers under 18. These laws ban factory work for those under the age of 16, limit work to 40 hours a week, and restrict the amount of work to be done at night.

Fourteen-year-olds may be employed outside school hours in specified occupations if all work is done between the hours of 7 a.m. and 7 p.m., and the person works no more than 3 hours a day, 18 hours a week when school is in session; or 8 hours a day, 40 hours a week during periods when school is not in session. There is also a whole list of "hazardous" occupations for which an employee must be at least 18 years of age, with limited exemptions for qualified under-age apprentices and student-learners.

Certain occupations are totally outside the federal laws, so young persons of any age may engage in the work. Agricultural work outside school hours is an example.

Many states have their own standards for youth employment, which must be followed if they are more strict than the federal rules. For example, many states require all minors to obtain work permits from school authorities before being employed. Minors must be paid minimum wage and overtime compensation unless they are otherwise exempt.

Employees' Rights and Responsibilities on the Job

2

Wages and Hours

The Federal Fair Labor Standards Act (FLSA) sets a nationwide minimum hourly wage and requires that employees receive overtime when paid by the hour and working more than 40 hours in a workweek. The FLSA, passed in 1938, is one of the oldest federal labor laws in the country. It applies to any business in interstate commerce, and to most state and local governments. A few specific industries are partly exempted: very small retail and service establishments, interstate trucking lines, seasonal amusement or recreational establishments, and seamen on non-American vessels. The vast majority of employers and employees are covered.

Q. What is the minimum wage?

A. The current federal minimum wage is $3.35 per hour. Some states have set the minimum wage higher than the federal rate, in which case state law prevails. The employer must pay the minimum wage or higher. Although the minimum wage is stated as an hourly rate, employees can be paid on any basis as long as the statutory minimum is met: $3.35 multiplied by hours worked. If an employee is paid for each piece of work completed, works 30 hours and earns $120 on this basis, their hourly rate would be $4, which exceeds minimum wage requirement. The same would be true if the employee is a salesperson who worked 30 hours and earned the $120 in commissions. The amount earned per hour of work controls, not how it is calculated.

Q. If a minimum wage is for each hour worked, what time is considered to be "hours worked"?

A. All the time an employee is required to be on duty or at the workplace is considered hours worked.

Employees don't have to be paid for short periods of time for clothes changing or wash-up after work, unless the job requires special preparation or clean-up. Rest periods of 20 minutes or less are counted as hours worked. Meal periods during which employees are free of all duties are not considered hours worked, even if employees are required to remain on the employer's premises. But if there are any duties during this period, such as keeping watch on a machine or awaiting a possible telephone call, the time will be counted as hours worked.

The following are also considered working time, where the employer so orders or benefits from the time.

- Waiting time (on or off duty), if it is an important part of the job or if the employee may be called to active duty.
- "On call" time, if an employee cannot use it for his own purpose.
- Sleep periods on the employer's premises, if the employee may be called to active duty during this time.
- Lectures, meetings and training programs put on by the employer, except those which are outside the employee's regular hours, not job-related, or are voluntary and require no work during such periods.
- Travel time other than from an employee's home to the place of work before and after the normal workday. Special rules apply for travel away from home.
- Time spent in adjusting grievances during the employee's normal worktime.

Q. Who keeps track of time worked?

A. The employer must keep reliable time records, although time clocks are not required. In any case, employers need only pay for hours worked even if an employee is punched in. Time clock hours may be rounded off to the nearest quarter hour or less for convenience, so long as rounding off works both ways.

Q. When is overtime compensation due?

A. Employees can work up to 40 hours in each workweek without earning overtime; if required to work more, they must be paid overtime for all hours worked in excess of 40. The overtime rate is at least "time-and-a-half," that is, one and one-half times the regular rate of pay.

The employer must count all hours worked in the workweek. Overtime is based solely on hours worked in one workweek, which is any regularly fixed period of seven consecutive days, usually the calendar week. Certain groups of employees such as hospital employees, police officers and fire fighters might have their overtime based on a period longer than a week. The FLSA does not require daily overtime compensation for work over eight hours in a day, unless there are more than 40 hours in the workweek. Some employers have a policy of

paying daily overtime, which may reduce any weekly overtime owed. Further, some state laws require payment of daily overtime for hours in excess of eight.

Q. How is overtime pay computed?

A. Begin by figuring the "regular rate" of pay, which must equal or exceed the minimum wage. Pay includes all payments made on any basis—hourly rate, commission, piece rate, incentive pay bonus, salary, or in the form of goods or facilities—and is converted to an hourly rate for determining overtime.

To find the regular hourly rate, total all compensation for work performed in the workweek and divide this total by the number of hours actually worked in the workweek. For example, if a worker is paid $5 an hour plus a production bonus of $20, and works 45 hours in a workweek, the regular rate is calculated as follows:

Compensation		
Hourly Wages		$225.00 (45 hrs. x $5/hr)
Bonus		+ $ 20.00
Total Compensation		$245.00
Regular Hourly Rate		
Total Compensation		$245.00
Hours Worked		÷ 45
Regular Rate	=	$ 5.44 per hour

It's easy to then calculate the additional overtime pay due. Thus, a worker would be paid an hourly wage of $5 for all hours up to 40, and $8.17 (1-½ times the regular rate of $5.44) for each of the five hours worked in excess of 40.

Q. How is overtime determined where a worker is paid a salary instead of hourly pay?

A. If a worker receives a salary for a 40-hour (or fewer) workweek, the regular rate is calculated by dividing the amount of the salary by the number of hours in the workweek. The worker is paid the regular rate for all hours up to 40, and 1-½ times the regular rate for all hours over 40. If the salary covers a period longer than one week, it is simply converted to the weekly equivalent and the regular rate is normally the same each week. Where a worker's salary covers all hours worked in a workweek, whether fewer than 40 or more than 40, the regular rate varies from week to week and is computed by dividing the salary by the number of hours worked in each week. Because a worker is compensated at straight time for all hours worked, overtime compensation is 1-½ times the regular rate for all hours over 40 hours, which results in a lower overtime premium than with a salary for a 40-hour workweek.

Q. Can a waitress in a restaurant be paid less than minimum wage because of the tips received?

A. Probably. If the waitress "customarily and regularly" receives more than $20

a month in tips, the employer can take up to 40% of the minimum wage as a credit. The waitress would receive $2.01 per hour as a minimum wage: $3.35 minus $1.34 (40% of $3.35). However, the credit *cannot exceed* the actual amount the employee receives in tips, and some state laws may further limit the credit. For a payment to be considered a "tip" under the FLSA, it must be freely given by the customer for waiting services rendered. A mandatory service fee added to a bill by the employer is not a tip even if it is paid to the employee. Gifts other than cash or check, such as merchandise or a ticket to a ball game, are not considered tips.

Employers may not take the tip credit unless employees know of it, and the employer can show the employees receive enough money in tips to make up for the reduction in hourly wage. Employers may not take the credit for more than 40% of the minimum wage, even if employee tips exceed the 40% figure. If the employee receives less then 40% of the minimum wage in tips, the credit can be no more than the amount actually received. Tips may be "pooled" or split among waiters, waitresses and other employees without affecting these rules. Computation of overtime compensation for tipped employees is not difficult: determine the total amount of compensation during the workweek except for the amount of tips which exceeds the tip credit taken by the employer, and then divide this amount by the number of hours worked. Since most serving people make an hourly wage less than the minimum, hours worked over 40 will usually be paid at 1-½ times the minimum wage rate.

Q. How is the FLSA enforced?
A. The Wage and Hour Division of the U.S. Department of Labor administers the Act. The Wage and Hour Division maintains regional offices in many major cities and local offices in some smaller cities. Employees can file a complaint or request an investigation, both of which are held in strict confidence. Investigators act either in response to a specific complaint or as part of a periodic "audit" of the company's practices. If there is a violation, the Wage and Hour Division will seek payment of unpaid minimum wages or overtime, with possible legal action in the federal courts to force the employer to pay. Employees can bring suit on their own to recover back pay. It is unlawful for an employer to retaliate against employees who exercise their rights under the FLSA.

Q. Do states also regulate such matters?
A. Although many states have no laws regarding wages, several states do. Employers should carefully check their state laws. Employers and employees may consult with the state department of labor.

Q. Must employers pay the minimum wage when they give employees meals?
A. Under certain conditions, an employer can credit the cost of meals, lodging, and other facilities furnished to employees as a part of the required minimum wage. These items must be furnished for the benefit of the employee, not pri-

marily for benefit or convenience of the employer. The actual cost of such items, not the cost the employer would charge to the public, can be deducted from the minimum wage owed to an employee. However, state laws may limit the amount which can be credited. Generally, an employer cannot take credit for furnishing items that are for the employer's own benefit, such as uniforms, tools, and safety equipment. A collective bargaining contract may also prevent such deductions.

Q. Are employer discounts given employees on purchases considered a part of the minimum wage?
A. No. Such discounts are considered a fringe benefit apart from wages.

Q. What amounts can an employer deduct from an employee's paycheck?
A. Generally, an employer cannot make deductions from pay that would reduce the hourly rate below $3.35. Deductions for taxes and union dues are permissible even if they cut into the minimum rate.

There may be state laws regulating deductions from wages. For example, in some states employers may not deduct *any* amount other than normal tax withholding unless the employee gives written consent.

Q. What about garnisheed wages?
A. Employers must deduct money if a court has garnisheed a worker's wages. The employer then turns the money over to the employee's creditor. Federal law generally limits the amount of wages that can be garnisheed to the lesser of (1) 25% of take-home pay, or (2) the portion of take-home pay which exceeds thirty times the federal minimum hourly wage; but more can be taken for support payments, in bankruptcy proceedings, or for unpaid state or federal taxes.

Q. Are supervisors "exempt" from the minimum wage and overtime?
A. Several types of employees may be exempted from the minimum wage and overtime requirements of the FLSA even though they work in covered industries. The most significant exemptions are:

- *"White collar" employees.* Executive, administrative and professional employees who are paid a sufficient salary are exempted from both the minimum wage and overtime requirements of the FLSA. The same exemption exists for "outside sales" personnel engaged in sales of goods or services away from their employer's place of business. These exemptions depend upon the particular duties of the employee in question.
- *Commission-paid employees.* If they receive a minimum level of compensation, employees whose compensation is at least half from commission payments are exempted from overtime requirements.
- *Full-time students.* Employers may apply for a certificate which allows them to employ a limited number of full-time students for a limited number of hours at an hourly rate less than the minimum wage. This program, which encourages

the employment of youth, allows a wage of no less than 85% of minimum.

Q. Does the law require employers to provide fringe benefits or give notice of discharge?
A. No. The FLSA sets a nationwide minimum hourly wage and requires that employees receive time and one-half for work in excess of 40 hours in a workweek. Fringe benefits are not required, and if an employer provides fringe benefits, such payments are not considered part of pay either for the minimum wage or overtime compensation.

Job Safety

The Occupational Safety & Health Administration (OSHA) was established by the Occupational Safety & Health Act (OSH Act). The OSH Act was passed by Congress in 1970 in order to create safe working conditions throughout the United States.

Q. Who is covered by the OSH Act?
A. Generally, the OSH Act covers all employers and employees in all 50 states, the District of Columbia, Puerto Rico, and all other federal territories. The OSH Act does not cover self-employed persons, farms where only immediate members of the farmer's family work, and workplaces already protected by other federal laws. Federal agencies are covered, but the OSH Act does not cover employees of state and local governments. However, many states have similar laws which may have stricter standards.

Q. What is an "occupational injury" under the OSH Act?
A. An *occupational injury* is any injury such as a cut, fracture, sprain, or amputation which results from a work-related accident or exposure. An *occupational illness* is any abnormal condition resulting from exposure to environmental factors in the workplace. Included are illnesses caused by contact with toxic or harmful substances.

Q. How does OSHA work?
A. OSHA establishes safety standards which employers are required to follow. Standards are published in the Code of Federal Regulations.

Q. Can employers or employees influence the safety standards?
A. Proposed standards are published in the Federal Register and public comment is invited. Employers may obtain temporary or permanent variances from standards by showing that noncompliance is due to circumstances beyond their control, or that existing working conditions are as safe as the proposed OSHA

standards. Employees have the right to a hearing on an employer's requested variances.

Standards concern the care of equipment, cleanliness of the workplace, safety equipment, and safety procedures in handling dangerous machinery or materials. OSHA regulations provide that a worker has a right to review medical and other employer records if the worker has been exposed to toxic substances.

Q. Can OSHA inspect a workplace for compliance with its standards and regulations?
A. Yes. Further, employees have the right to have a representative (i.e., union officials or others) present for a workplace inspection. If there is no employee representative, the inspector must talk to a reasonable number of workers about workplace safety.

Q. What can an employer do under the OSH Act and OSHA regulations?
A. An employer may: ask OSHA for help in improving safety in the workplace without risking an inspection; require warrants for inspections; request identification of OSHA officers making an inspection; accompany the inspector on the inspection of the workplace; request an explanation of the reason for the inspection; request an opening and closing conference with the inspecting officer; require that any observed trade secrets remain confidential; apply for temporary or permanent variances from OSHA standards.

Employers and employer associations may work within the administrative process in modifying and formulating OSHA standards.

Q. Does OSHA require a safe workplace?
A. Yes. It is the employer's responsibility to maintain a safe and healthy working place. An employer should identify hazards and make sure employees use safe equipment and safe tools. An employer should be familiar with mandatory OSHA standards.

Employers of 11 or more employees are required to keep records of occupational injuries and illnesses as they occur. Employers must also provide medical examinations when required by OSHA standards.

Employers should make copies of OSHA standards available to employees, post OSHA notices of citations and hang posters informing employees of their rights.

Q. Can an employee seek to get a safe workplace without employer retaliation?
A. Yes. Employees have a right to demand safety and health on the job without fear of punishment. If an employee believes that he or she has been discriminated against for exercising OSHA rights, he or she may seek relief from the nearest OSHA office within 30 days of the alleged discrimination. Employee complaints are kept confidential. Complaints are investigated and, if necessary, OSHA may seek court-ordered compliance with safety standards.

Q. What particular rights does an employee have under the OSH Act and OSHA regulations?

A. Employees have the right to get information and training regarding toxic substances; review the OSHA standards applicable to the employer; be informed as to precautions being taken by an employer; request an OSHA inspection if work conditions are hazardous; refuse a job assignment if the employee reasonably believes the work will lead to serious injury or death; consult with an inspecting officer during inspections; object to a request by an employer for a variance to an OSHA standard, or the period of time given the employer to correct a violation; and participate actively in formulating OSHA standards.

Q. What are an employee's responsibilities under the OSH Act?

A. Employees should exercise their rights under the OSH Act in a responsible manner. Read the OSHA poster at the job site and comply with OSHA safety standards; follow the safety rules set out by the employer; wear protective equipment; report hazardous conditions and job-related illnesses or injuries to the employer; and cooperate with OSHA inspecting officers when asked about workplace health and safety conditons. Wearing and/or using safety equipment is of particular importance for employees.

Employee Privacy

Privacy rights concern the expectation that certain information about the employee obtained for employment-related purposes will remain confidential. It is important to remember that public employees have substantially greater privacy rights than do private employees.

Q. Does any single law guarantee rights of privacy in the workplace?

A. No. The extent of a given employee's privacy rights depends upon a number of factors: the nature of the particular information in question, applicable federal/state legislation, federal/state agency standards, employer policies, civil service or state personnel rules, collective bargaining agreements, and the common law of a given state. A key factor is whether the employer is public (i.e., federal, state, local government) or private.

Q. What federal laws are involved?

A. Two important federal laws are involved. The Freedom of Information Act (FOIA), passed in 1966, gives the public access to a wide range of federal records. Court rulings broadly interpreting the FOIA resulted in the invasion of privacy of some government employees. Thus, in 1974, the federal Privacy Act was passed to ensure the privacy of government workers.

The federal Privacy Act only applies to federal employees and requires that

federal agencies make an employee's records available to him or her. It also allows the employee to challenge information in the file, and restricts outsider access to the file. Federal agencies can't disclose the contents of an employee's records without the employee's written consent. The Privacy Act restricts the information that a federal agency can gather about an employee to that which is necessary and relevant to accomplish a purpose of the agency for which the employee works.

In private employment, employee access may be guaranteed by employer policy or a collective bargaining agreement. Also, under OSHA standards, employees are entitled to inspect certain medical records and records of exposure to toxic substances in the workplace.

In New York, Pennsylvania, Connecticut, New Hampshire, Illinois, Michigan, Wisconsin and California, private employees have the right to see their personnel files. However, state laws differ, so one should get advice on a particular state's law.

Q. If the FOIA requires disclosure and the Privacy Act prohibits disclosure, which takes precedence?

A. This is not yet clear. Probably, the U.S. Supreme Court will ultimately have to decide.

Q. What about state law?

A. A wide range of state laws concern workers' privacy rights, and some give a worker more protection than federal law. It is important to check the state law regarding access to personnel files, medical records and use of lie detector tests.

Q. Can an employer crack down on white-collar crime by requiring all employees to take a lie detector test?

A. It depends. At present, federal laws permit polygraph tests and other "truth detecting" systems such as the psychological stress evaluator (PSE) or voice stress analyzer. However, many states have outlawed or restricted these systems in employment matters.

Massachusetts and New Jersey totally prohibit use of polygraphs in employment; New York prohibits the PSE but not polygraphs; and some states restrict what can be asked, eliminating questions on religion, politics, and sexual preference. Thus the law in this area is undergoing rapid change and development, depending greatly upon state law. Moreover, a bill has been proposed in Congress to restrict or prohibit use of polygraphs and the like.

Q. Can an employer listen in on phone calls that workers make at work to monitor misuse?

A. A 1968 federal law prohibits employers from listening in. But under the "extension phone" exemption an employer can monitor employee calls by listening in on an extension, if this is done in the ordinary course of an employer's

business. It is unclear what is meant by the "ordinary course of business." Many states have similar statutes and some have broader protections than the federal law.

Q. Can an employer place video cameras in the work area to monitor workers' performance?
A. Generally, yes. It's not against federal law, and state laws usually permit it.

Q. Some employers conduct regular searches of employees and their personal belongings in order to detect employee theft, drugs, etc. Is this legal?
A. Within certain limits, yes, though a collective bargaining agreement might restrict such searches. An employer has to be careful about how this is done. It might be wise for an employer to undertake searches in the least intrusive manner available such as out of sight of other employees, or in the plant instead of in the parking lot. By stepping out of bounds during searches, the employer may become liable for assault, battery, or employee false arrest charges.

Q. Can an employer require employees to take a physical exam to get or keep a job?
A. Yes, an employer can require medical examinations to determine ability to perform the duties and tasks required in a job, but the results must be kept confidential. Many states require that the employer pay for the cost of mandatory physical exams.

Q. Can a private employer disclose personnel file information to people inside or outside the company?
A. Generally yes. Private employees may have little control over their personnel files. There are fewer restrictions on a private employer when the employer chooses to disclose personnel information. Note that government employers have greater restrictions on releasing employee information. See pages 22–23. Some state laws guarantee the employee access to his or her personnel file at reasonable times.

Q. Can a person's former employer provide information about him/her to a prospective employer?
A. This is allowed in many states if the employer has a legitimate need to know. But information furnished by a former employer should be truthful and relevant. Employers should not pass on false information or hearsay that could be a slander or libel. Many state laws expressly prohibit blacklisting of employees. A former employer who improperly discloses confidential matters, such as medical information from a personnel file, may be liable for invasion of privacy.

Many states have laws requiring that a former employer provide certain information to a prospective employer at the request of the employee.

Q. Can a union get information from an employee's personnel file?
A. A union can generally obtain information from an employer about union members it represents, typically in connection with either a disciplinary matter, enforcement of a collective bargaining agreement, or in regard to contract negotiations. The courts have recognized, however, that some information may be restricted. For example, an employer is not required to disclose an employee's test scores without the worker's consent. The collective bargaining agreement may cover this.

Q. Can an employer conduct a credit check on an employee?
A. Yes, but the requirements of the federal Fair Credit Reporting Act may apply. If so, the employer must notify the employee that an investigative report is being prepared; if asked, explain about the investigation; and provide the employee, upon request, a copy of the report. If a person is damaged by the report (i.e., not hired or denied promotion), he or she is entitled to the name and address of the investigating agency, has the right to have the disputed information reinvestigated, and can have his or her version of the facts included in any subsequent reports the investigator makes. There are many similar state laws patterned after this federal one, so state law should be checked.

Q. Can a private employer ask an employee about his personal lifestyle?
A. Within certain limits, yes. There are few restrictions on private employers in this area, other than the prohibitions against sex, race, ethnic group, or religious discrimination, and certain restrictions on inquiring about criminal records. Some state laws and local ordinances prohibit marital status or sexual orientation discrimination. On the other hand, public employers generally must show some reasonable basis for making most personal inquiries, and might have to show a compelling need in order to inquire about political activities.

Q. Can an employer force a long-haired, bearded employee to get a haircut and to shave?
A. Generally, private employers are free to have a grooming or dress code. Public employers may have to make some concessions to an employee's freedom of individual expression; even so, the employer need only show that the restriction is reasonable. There might be some protection provided by discrimination laws where the restrictions affect a certain class or ethnic group of employees more than others. For example, a rule requiring stricter weight limits for female employees or requiring black men to shave despite their susceptibility to a skin condition aggravated by shaving will be looked at more closely. Such a rule might be unlawful because of the greater likelihood of impact on protected persons.

Unions and Collective Bargaining

Unions enable employees to bargain as a group rather than individually with an employer over "wages, hours, and other terms and conditions of employment." This is called "collective bargaining." When a union wins an election or is recognized by an employer it becomes the *exclusive representative* of the organized group of employees (called a "bargaining unit"). The employer may not negotiate with any other organization or individual with respect to wages and conditions of employment for those in the bargaining unit. If there is no union an employer may unilaterally (i.e., without consultation or negotiation) set wages and other terms of employment.

Union advocates believe collective bargaining equalizes the negotiating power between an employer and its employees so that employees are able to participate effectively in establishing and enforcing their employment terms, thus protecting job security, seniority, and work safety. Critics argue that unions are costly, unnecessary and disruptive, and that unions further group interest at the expense of individual employees who wish to address individual concerns and welfare. In most union elections these arguments are raised. Then, by secret-ballot vote, the employees in each bargaining unit choose whether or not to have a union.

Q. What is the source of these rights?
A. Private workers are given the right to bargain collectively under the National Labor Relations Act (NLRA or Act) if their employer is covered by the Act.

Q. When is an employer covered by the NLRA?
A. There are a number of factors to consider in determining whether there is coverage. The National Labor Relations Board (NLRB), which administers the Act, has jurisdiction over all private enterprises whose activities "affect" interstate commerce. However, the NLRB may decline to assert jurisdiction over (i.e., refuse to apply the Act to) employers not meeting a minimum volume of business in interstate commerce. The NLRB's rules on this can be pretty technical; seek legal expertise on this issue. Generally, it can be said that companies (a) doing business in more than one state or (b) shipping or receiving out-of-state goods would be covered. The NLRB might not assume jurisdiction over very small companies doing little interstate business. Where the NLRB declines to assert jurisdiction, the right to collectively bargain and other employee protections under the NLRA would not be available. However, similar rights and protections can be made part of an employment contract, even where there is no collective bargaining agreement. Some states have laws similar to the NLRA which apply to private sector employers not covered by the NLRA. A phone call to the closest NLRB Regional Office might answer some questions.

The Railway Labor Act of 1926 (RLA) is a law which provides for collective bargaining between railway and air carriers and their employees. The RLA es-

tablishes administrative procedures and boards for the prompt settlement of labor disputes in interstate travel. The RLA guarantees the right to collective bargaining for employees and preempts the NLRA in the air and railway industries.

Although public employees are not covered by the NLRA, they may have bargaining rights under other federal or state laws. Federal government workers are permitted by law to bargain collectively, a process overseen by the Federal Labor Relations Authority. Many states have collective bargaining laws similar to the NLRA that apply to public employers and/or private companies not covered by the Act. Over half the states permit some form of public employee collective bargaining. (See p. 31 for a complete list of these states.)

Q. Are there employees who have no right under the NLRA to collectively bargain?

A. Yes, agricultural workers, domestic employees of a family, managerial employees, persons employed by a parent or spouse, independent contractors, and supervisory employees.

This last exception—supervisory employees—is especially important. Under the Act, supervisors have no legal *right* to bargain collectively, but are not prohibited from doing so. Thus, supervisors can organize, but they do not enjoy NLRA protections, including protection from being fired for advocating collective bargaining.

Q. Assuming an employer is covered by the NLRA, what does this mean for the employees?

A. Essentially employees have the right, in the words of Section 7 of the NLRA:

> [T]o self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...or to refrain from engaging in these activities.

Employees are, for the most part, free to use nonworking time to engage in union activities. Indeed, solicitation of members in nonwork areas during nonwork time is *presumptively* legal under the NLRA.

Q. How does a union become the representative of a group of employees?

A. The union must show that a majority of workers want union representation. The process begins with the union gathering support among a group of employees who have enough in common (i.e., share a "community of interest") that a single union can adequately represent their interests in a bargaining unit. Unions usually ask employees to sign a card (sometimes called an "authorization card") indicating their interest.

If the union gets at least 30 percent of the employees to sign cards, or to show their interest in some other way, it can ask the NLRB to hold a secret ballot election. The election will determine if a majority of the employees want union

representation. If the union is able to get most of the employees to sign cards, the employer might voluntarily recognize the union. But an employer has *no obligation* to voluntarily recognize the union. An employer has the right to have the issue decided by a secret ballot vote of the employees in the bargaining unit. During the time period before the vote, both the union and employer may present their views to employees on whether there should be a union and collective bargaining. If a majority of the employees voting choose to have a union, then the union is certified by the NLRB as the exclusive bargaining representative of all employees in the bargaining unit. If the union does not receive a majority of votes cast, then things will continue as before; employees will represent their own individual interests. It is the employees' right to decide what they want to do.

Q. Workers have the right to engage in concerted activity. What does this mean?
A. The term "concerted activity" has been the subject of many legal decisions. It is significant because the NLRA says that employees cannot be disciplined or discharged for engaging in protected concerted activities. The important idea is that *group* activities are protected by the NLRA, and include not only union meetings, soliciting of support or other kinds of activities connected with union organizing, but also activities not involving a union or union organizing efforts. Thus, action by groups of employees to improve their lot in the workplace are considered protected concerted activities, whether or not the employees are affiliated with or represented by a union. For example, group protests over hazardous or dangerous working conditions have been considered a protected concerted activity. Another typical form of protected concerted activity is an organized strike (withholding services to enforce collective bargaining demands) and picketing to advertise the dispute.

Q. What kinds of activity by employees are "unprotected"?
A. Unannounced job actions, slow-downs, intermittent strikes, or refusals to perform otherwise valid and safe work assignments. Violence, sabotage, or willful destruction of company property are also forbidden. These differences in "protected" versus "unprotected" activities can determine whether or not employees might lawfully lose their jobs. Whether a given activity falls within the category of "protected concerted activity" depends upon the facts of a given case. In general, activities aimed at job safety and protection are likely to be protected, while job actions in the nature of violence or insubordination are not.

Q. Do employees who do not believe in unionization have the right to reject it?
A. Yes. Employees have a choice to vote against the union in an election, since their Section 7 rights expressly include the choice to not have collective bargaining. However, it is the majority of employees who decide; individual em-

ployees are not entirely free of obligation to a union if one is chosen, because the union becomes the *exclusive representative* of all employees in the bargaining unit.

Q. Once a union is chosen, does an employee have to financially support it?
A. Perhaps. The law provides for some fairly complicated "union security" devices to enforce the obligations of an employee to the union, and to restrict "free riders." The law authorizes some types of union security because it is necessary to provide some financial stability to the union so that it can carry out its responsibilities to employees, such as negotiating the collective bargaining agreement, processing grievance and arbitration cases or providing legal services. Usually union security provisions are set forth in the collective bargaining agreement. An "agency shop" provision is one example of union security, and requires that employees in the bargaining unit pay to the union either union dues or a fee which is the equivalent of the union's initiation fee and dues. Where the fee option is chosen, formal union membership is not required, there is no obligation to follow internal union rules and participation in union affairs will be prohibited.

A similar arrangement is the "union shop" provision, which requires all newly-hired employees to join the union after a grace period of at least thirty days, or lose their job. However, because of the technical provisions of the NLRA, an employee may not lose his or her job under a "union shop" contract unless he or she fails to pay dues or fees, even if he or she doesn't join the union. The result is that union shop and agency shop provision have pretty much the same effect: requiring *only* economic support.

The old "closed shop" provision, *now illegal*, required an employee to join the union in order to get hired. Some states have "right-to-work" laws, which make other union security provisions unlawful in that state. Most of these states are located in the South and West.

Q. What is a "hiring hall?"
A. A hiring hall refers to the agreement between a union and employer whereby the union serves as a recruiting/referral/hiring agency for the employer. Hiring halls are common in industries involving casual labor or intermittent employment.

Q. Is a hiring hall arrangement lawful?
A. Yes. Hiring halls help keep track of employees and assist in providing security and seniority systems in an industry, such as construction, in which employees typically work only temporarily for one employer. Some contracts call for the union to be the exclusive job referral agency; others make the union a non-exclusive hiring agent and permit the employer to hire directly. Hiring halls enhance the power of the union and provide a useful way for employers to get workers.

While hiring halls are not illegal, they must be conducted within certain guidelines to avoid unlawful abuses. For example, the union cannot refuse to refer non-union workers. A union may charge non-members a fee for use of the hiring hall as long as the fee is not excessive and is related to the union's cost in operating the system. If workers encounter problems, they should consult a union representative, the employer, the NLRB or an attorney.

Q. What is the primary legal responsibility of a labor union?
A. To engage in collective bargaining with the employer on behalf of the employees and to obtain and administer a collective bargaining agreement. Both the employer and union must bargain in good faith. If an agreement can't be reached, a strike may occur. Frequently, negotiations by a union result in a contract. A typical collective bargaining contract will cover all of the basics: wage scales, work hours, fringe benefits, work rules, seniority, job assignments, order of lay-off and recall, shift assignments, promotions, transfers, etc. Finally, nearly all contracts contain some system for resolving grievances affecting all employees and specific disciplinary problems of individual employees. This is usually called a "grievance procedure."

Q. How does a grievance procedure work?
A. In a grievance procedure, the union represents an employee if there is a problem over the application of the contract. It is usually made up of several steps, with many opportunities to informally resolve the problem at each step. If there is no resolution, many contracts provide for a hearing before a neutral individual usually called an arbitrator. At the hearing, the union presents the employee's side of the issue, including witnesses and arguments, and the employer presents its side. The arbitrator then makes a decision either upholding or denying the grievance. The decision binds the employer and employee to the terms of decision. Arbitration decisions, sometimes called "awards," can be enforced by the courts against the losing party.

Q. What if the union refuses to represent an employee or improperly represents him or her?
A. When a union is chosen, it assumes a legal duty to fairly represent all employees. This first, and perhaps highest, duty of the union is to adequately and fairly negotiate on behalf of its members. This doesn't mean that each individual's favorite issues are raised during contract negotiations. Further, the union may negotiate a contract that is less favorable for a particular occupation or group of employees.

The duty of fair representation means that the union must represent a worker fairly if he or she has a valid grievance under a negotiated collective bargaining agreement. The union must investigate and consider employee grievances in good faith. Although the union need not pursue every grievance, it must treat similar employee problems the same, without discrimination or bad faith. Nonetheless,

an employee does not have an absolute right to have a grievance pursued to arbitration by the union.

Representing employee grievances is a very important responsibility, and most unions take it very seriously. If the union's failure to fairly represent employees results in harm to them, they can file charges with the NLRB or take the union to court; however, mere negligence by the union in its representational effort will not constitute a breach of the duty of fair representation. In certain situations, an employee or group of employees may present a grievance to the employer without union involvement.

The duty of fair representation is important with respect to discrimination. That is, the union cannot discriminate against or among its members with respect to race, sex or other invidious and arbitrary classifications. According to the NLRB, under Section 7 of the NLRA, employees are entitled to be free from discriminatory and unfair treatment by their union. A union that carries on or participates in discriminatory activity may be guilty of an unfair labor practice and subject to lawsuits for damages under a variety of laws.

Q. Do public employees have a right to collectively bargain?

A. Generally yes, but not under the NLRA. Many state and local governments have enacted comprehensive collective bargaining statutes permitting state and/or local government workers to organize and collectively bargain. Such a state or local law (similar to the NLRA) generally provides basic rights of organization, collective bargaining, and concerted activity; unfair labor practice provisions; and the duty of employers to negotiate in good faith. The states which have statutes authorizing collective bargaining for some or all public employees include: Alabama, Alaska, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, Wisconsin and Wyoming. Public employee occupations typically authorized to engage in collective bargaining include firefighters, police, municipal or county workers, community college teachers, school teachers and other school system employees, and state workers, including state police and university faculty and employees.

Q. What are some of the differences between state collective bargaining laws and the NLRA?

A. Public employees generally don't have the right to strike. If they do, the right is highly regulated by state law. Comprehensive civil service systems co-exist with the collective bargaining agreements, and many rights are covered by both the civil service system and the collective bargaining agreement. This is true for such things as job evaluation, job requirements, testing, seniority, job termination, discipline, overtime, and layoffs.

Q. Is it true that the laws pertaining to public workers are more varied and complex than those of the private sector?
A. Yes. In addition to state collective bargaining laws other laws apply to employment in the public sector. For example, comprehensive civil service laws or teacher tenure rights interact with collectively bargained rights and constitutional guarantees. Therefore workers represented by a union with questions concerning job evaluations, promotions, transfers, etc., would be advised to consult with their union representatives as to collective bargaining agreement matters as well as the civil service regulations. Non-union workers may wish to consult a civil service advisor, personnel officer, employment relations specialist or attorney on such matters.

Q. What is the best advice one can give both employer and employee on the issue of unionization and collective bargaining?
A. There are many questions about unionization which are beyond the scope of this book, such as: replacement of strikers, picketing rights, firing employees for valid reasons versus for union activity, the extent to which employees may engage in union activities on company premises, complicated rules dealing with grievance representation, problems in organizing health care workers and many other problems unique to unionization and collective bargaining. Employees and employers alike would be well advised to seek the advice of a specialist in labor relations and labor law on these and other questions.

Discrimination

Americans believe strongly that democracy should ensure equal opportunity, but not necessarily equal results. This means that every citizen should have an equal opportunity to succeed, and fairness in the work place is vital to success in life. Many laws—federal and state legislation, agency regulations and guidelines, municipal and local laws and executive orders—prohibit employment discrimination on the basis of factors such as race, sex, color, national origin, religion, marital status, age and handicap. However, many difficult issues arise. Can an equal opportunity for disadvantaged groups be guaranteed without being unfair to others? Can the law be race conscious without fostering racism? Are quotas allowable, and if so, when and in what circumstances? Some of these issues are addressed below.

Q. What employment situations do discrimination laws cover?
A. The laws cover all aspects of the employment relationship—hiring, wages and benefits, evaluations, promotions, job assignments, firing, etc. Intentional discrimination is always banned; practices which discriminate unintentionally are also banned, unless they are job related and the discriminatory impact is unavoidable.

Q. Specifically, what laws are we talking about?
A. The two primary federal statutes are Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA). Together, they generally prohibit discrimination by employers, unions or employment agencies on account of a person's race, sex, color, national origin, religion or age (if over 40). In some circumstances the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit discrimination. State laws also exist which may provide broader prohibitions and more favorable procedures. The purpose of these laws is to ensure that all persons are treated equally in all actions and decisions affecting employment.

Q. Are there special considerations in bringing a discrimination claim?
A. Yes. First, employment discrimination laws often embody strict time limits for bringing the claim. Thus one should proceed without delay and be sure to get expert advice. Second, if terminated or not hired for discriminatory reasons, one should *seek another job.* This is important even if it appears that there is legal entitlement to the former job by the employee or applicant. If the employee or applicant doesn't seek other work, it looks like he or she wasn't willing or able to work, perhaps weakening the discrimination claim and limiting any award of back pay. It is important to show that the claimant wants to work.

RACE DISCRIMINATION

Federal law prohibits job discrimination because of a person's race. This applies to both private and public employers. In addition, Executive Order 11246 requires that employers doing significant dollar amounts of business with the federal government agree not to discriminate on the basis of race, and to take affirmative action to hire and promote racial minorities. Nearly every state and many local governments have laws designed to eliminate race discrimination by employers. These laws protect all races and national origins, including blacks, Hispanics, Asians, Native Americans and whites.

Q. Who does Title VII cover and exactly what does it do?
A. Title VII prohibits almost any employer (employers with less than 15 employees are not covered) from discriminating against individuals on the basis of race, color, religion, sex or national origin in employment-related matters. Remember, some aspect of employment must be affected as a result of discrimination by an employer, union or employment agency in order for Title VII to apply. For example, Title VII would not apply to race discrimination in social activities. Nevertheless, the concept of employment is quite broad, including compensation, terms, conditions and privileges of employment. An employer need not fire or deny a promotion to an employee in order to violate Title VII. If an employer allows the work place to become a hostile (i.e., racist) environment, an employee might take action under Title VII forcing the employer to provide a nondiscriminatory work environment. Title VII requires an employer

to take steps to prevent racial intimidation and harassment if the employer knows about it.

Q. What discriminatory practices are prohibited under Title VII?
A. All intentional discrimination is prohibited, such as unwritten "whites only" recruitment policies, or considering race in setting wages, assigning shifts, etc. Intentional discrimination is usually proven by showing that a minority individual is treated less favorably than a white person in the same job, and that the apparent reason for this discriminatory treatment is race. This is sometimes referred to as "disparate treatment." An example is a black worker who is fired for continually arriving late at work while white workers in similar jobs who arrive late are merely reprimanded or suspended. Intentional discrimination exists if the employer knew or should have known of the unequal treatment and failed to take corrective action. The employer, generally speaking, is responsible for the acts of a supervisor.

Title VII also bans tests or requirements for employment that have a racially discriminatory impact, regardless of whether the impact is intentional. This is sometimes referred to as "disparate impact." It usually becomes apparent only when a statistical study indicates that the test or requirement tends to disqualify minorities at a greater rate than whites. Thus, a minimum educational level might screen out a greater percentage of minorities than whites. (For further discussion of hiring tests, see pp. 11–12.) Discriminatory impact is unlawful unless the employer can prove that the requirement is a business necessity and that no other method or test would have a less discriminatory impact.

Q. What administrative agency enforces Title VII?
A. The Equal Employment Opportunity Commission (EEOC). EEOC investigates charges filed by individuals, attempts conciliation to see if the parties can resolve their problems, and as a last resort, takes the employer to court. A major effort is made to informally resolve the problem through negotiation and settlement.

Q. How should a claim of unlawful discrimination be pursued?
A. First, employees should take the matter to their employer. This is important because the employer may not know about the discrimination or the actions or attitudes of a particular supervisor. If the matter remains unresolved, a valid claim may be filed with the EEOC. Many states have an employment discrimination agency or a human rights commission, and a claim may be filed there; the EEOC will often defer to the state agency for initial processing.

There are very strict time limits imposed on filing claims, and if they are not met one loses the right of enforcement in the courts or before an agency. To be absolutely sure the claim will be heard, an employee should file a claim within 180 days from the date the discriminatory act occurred. The state agency time rules vary; it is a good idea to talk to someone at the EEOC or state civil rights agency to be sure time limits are met. An employee is protected from employer

retaliation for filing a charge with the EEOC or a state agency.

The following procedures occur when a charge is filed:

- A charge is filed with the EEOC either initially or after a state agency declines to proceed.
- The employer is notified.
- The EEOC begins an investigation, usually involving a review of records and perhaps an informal "factfinding" meeting with the employer and employee so that everyone can be heard.
- The EEOC attempts conciliation to achieve a voluntary settlement. If no settlement is reached, the EEOC will determine if there is "reasonable cause" to believe there has been discrimination.
- Both parties are informed of the decision.
- If the EEOC finds reasonable cause, it will either take the employer to court, or it will give the employee a "right to sue" letter, at which point the matter of whether to proceed further is up to the employee.
- If the EEOC does not find reasonable cause, the employee still will be issued a right to sue letter to take the claim to court.
- If the EEOC holds a claim for 180 days after it is filed, an employee may request a right to sue letter, whether or not the EEOC has completed its processing of the case.
- Lawsuits can be filed in federal court within 90 days after receipt of the right to sue letter.
- If no action is taken within this time limit, the right to sue is lost.

Once a suit is filed, the burden is on the employee to prove to the judge that the employer violated the law. It is also possible that a state civil rights agency will retain the case, and after investigation (following procedures similar to EEOC) make a determination. Because various state agencies proceed differently, a claimant should find out the particular procedure to follow to be sure his or her rights are fully protected in the state agency.

Q. What is meant by "Affirmative Action"?

A. The phrase "Affirmative Action" usually refers to a plan or program undertaken by an employer which places job-related requirements upon the employer. These plans are created to both avoid and correct unlawful discrimination with respect to the employer's workforce and to job applicants. Such plans or programs are usually called Affirmative Action Plans.

Q. What is the purpose of an Affirmative Action Plan (AAP)?

A. There can be a number of purposes behind an employer's AAP. A plan is usually tailored to a particular employer's situation. One purpose might be to simply insure nondiscriminatory treatment of employees and job applicants. Another might include an effort to remedy the effects of past employer discrimination or eliminate objectionable employment practices. An AAP might also be created to remedy underutilization of minorities and women by the employer and thus be used to attain a more equitable representation of minorities or

women in the employer's workforce. These are the typical reasons for an employer's Affirmative Action Plan.

Q. As a non-minority employee, will I be affected by my employer's AAP?
A. It is difficult to categorically say because it depends upon a given employer's particular plan. However, an employer's AAP might well involve policies related to recruitment, hiring, promotion, transfer and, in some cases, seniority or layoff as well as other terms and conditions of employment. Therefore, while an employer's AAP could well affect the interest of current employees, it depends upon a given employer's plan. In most situations it is unlikely that an employee's AAP would seriously jeopardize job security or seniority. The impact of a given employer's AAP is more likely to be felt by competing job applicants or, to a lesser degree, situations involving promotion.

Q. As an employer, am I required by law to have an AAP?
A. The answer to this question depends upon a number of factors. As a generality, Title VII does not require all employers covered by Title VII to adopt an AAP. However, AAPs are permissible under Title VII. Moreover, if an employer is a major government contractor, it may be required to implement an Affirmative Action Plan under Executive Order 22146, which is administered by the Office of Federal Contract Compliance Programs (OFCCP). The "affirmative action" requirement and employer plans adopted in accordance with it are regulated in considerable detail by the OFCCP. Employers are well advised to seek expert advice as to the nature of federal regulatory requirements which control this important area. Thus, an AAP may be a contractural obligation imposed by the government. Another factor for employers to consider is whether and to what extent state laws require the adoption of Affirmative Action Plans for employers contracting with state or local governments. Moreover, public employers may well be required to adopt an AAP pursuant to executive orders of governors or mayors and other public bodies. A court may order an employer to adopt an AAP as a court ordered remedy in response to finding of unlawful discrimination by an employer.

Q. Beside federal or state governmental requirements or court ordered AAPs, are there other ways in which AAPs are created?
A. Yes. AAPs may result from lawsuits in which the parties agree to compromise and negotiate an AAP. Thus the AAP may result in a court authorized "consent decree," which is a form of court order and subject to enforcement by the court even where there has been no finding by the court of unlawful discrimination. A consent decree is similar to a court authorized settlement. Sometimes an AAP may result from a voluntary agreement between an employer and labor organization and thus contained in a collective bargaining agreement. Finally, an employer, on his own initiative, may decide to adopt an AAP.

Q. Why do employers voluntarily adopt AAPs in cases where they are under no strict legal obligation?

A. Good faith adoption of an AAP may insulate an employer from claims of discrimination or discrimination law suits and thus avoid very expensive litigation costs. For whatever self interest or political reasons, an employer may wish to take the lead by complying with the national policy of a discrimination-free workplace. Thus customer or community pressure may make it "good business" to adopt a voluntary AAP, or good labor/management relations might require collectively bargaining an AAP. An employer may be contemplating an expansion of business opportunities through federal or state contracts and thus desirous of preparing for future AAP requirements imposed upon federal contractors.

Q. Is it true that most AAPs result in a form of "reverse discrimination" by establishing policies which afford preferential treatment to minorities and women at the expense of nonminorities and which set up rigid employment quotas based upon race, sex, or national origin?

A. As a generality, the answer is no. AAPs do not themselves envision "reverse discrimination" against nonminority workers nor are rigid quotas condoned. However, some AAPs are developed to achieve attainment of an equitable representation of minorities and women in the job groups that comprise the workforce of a given employer. The measure of comparision is the proportion of minorities and women reflected in the qualified labor force, where the employer is located, is hiring or is recruiting, compared to proportions found in the job groups which comprise the employer's workforce. This comparison may require statistical analysis.

Employers then identify and assess the extent of "underutilization" of qualified minorities in their workforce. For example, suppose, in a given job category, that no qualified women are employed by the employer yet the relevant area labor market shows 45 percent qualified women work in the particular job category. In such a case the employer may seek to establish a percentage goal (not necessarily 45 percent) to recruit, through internal promotion or new hires, women in order to achieve a more equitable representation in the employer's workforce. Goals are tailored to the particular employer and are typically set in light of a number of factors such as turnover rates, number of qualified minorities and women, number of job openings, degree of training/experience, number of in-house candidates, etc.

Q. If preferential treatment is extended under an AAP to members of underrepresented groups, isn't this a violation of Title VII's prohibition against employment discrimination since it amounts to reverse discrimination against nonminorities?

A. No. Title VII has been interpreted to permit voluntary AAPs in some circumstances by employers to remedy manifest imbalance in traditionally segregated job categories. This has become particularly vexing problem in cases where

nonminority employees' interests are adversely affected.

The courts at this time are in the process of laying down some general guidelines where preferential treatment accorded to members of disadvantaged groups will be permitted. There are still some areas of serious disagreement among judges and various courts on this matter, and therefore the law is in a state of change.

Q. What are some of the factors that a court will consider in ruling upon the validity of an AAP which provides some level of preferential treatment to members of disadvantaged groups?

A. A number of factors are emphasized by the courts in upholding a "voluntary" AAP where preferential goals are present in favor of minorities or women. First, the voluntary plan's purpose should be to eliminate manifest racial or sex based imbalances in the workforce. Such imbalances should clearly demonstrate underrepresentation of disadvantaged groups which are protected by Title VII (i.e., race or sex). Second, the plan cannot "unnecessarily trammel the interests" of nonminority workers (i.e., white or male workers). Nonminority employees should not be automatically excluded from, say, promotional opportunities since legitimate and firmly rooted expectations on the part of these nonminority employees is a legitimate interest which concern the courts. The AAP should be designed by the employer to minimize the effect upon existing workers and any intrusion on legitimate employee expectations. Third, the minority person benefitting from the plan must be "qualified." AAPs designed to favor unqualified nonminorities should be avoided. Fourth, the AAP should not adopt strict quotas but merely strive toward realistic goals. Such goals should take into account turnover, layoffs, lateral transfers, new job openings, retirements, and availability of qualified minorities in the area workforce. Thus, slavish adherence to fixed quotas would not be acceptable. Fifth, plans that focus primarily upon recruitment and hiring of new employees will likely receive more hospitable treatment from the courts than plans which impact upon promotion, seniority or layoffs. Finally, the AAP should be temporary in its duration and not be established as a long term or permanent condition of employment. Thus an agency's plan may be designed to attain a balanced workforce, but not necessarily to maintain one.

The important thing to remember is that the courts are concerned with a number of factors: sustaining the national policy against discrimination in employment, maintaining an equitable balance between the interests of protected minorities and those of the majority in a given workforce and maximizing voluntary adoption of plans by employers to suit their particular needs.

SEX DISCRIMINATION

Q. What laws ban sex discrimination?

A. The same section of Title VII that makes race discrimination illegal also forbids sex discrimination in employment. The federal Equal Pay Act requires employers to pay men and women equally for substantially equal work. The U.S.

Constitution prohibits sex discrimination in certain situations. The NLRA, which requires unions to fairly represent all employees in the bargaining unit, bans sex discrimination by unions in the workplace. Also, Executive Order 11246 bans sex discrimination by employers who do business with or receive financial assistance from the federal government. Most states have laws prohibiting sex discrimination in employment.

Q. Do these laws protect only women?
A. No, they protect men and women and have opened up areas of employment formerly reserved for one sex or the other.

Q. What kind of discrimination is prohibited?
A. These laws prohibit intentional discrimination (disparate treatment), where one sex is treated differently from the other; and unintentional discrimination (disparate impact), where employment practices have a discriminatory impact on working conditions or job opportunities such that one sex is favored over another.

If an employer were to provide insurance coverage for males only, female employees would be victims of disparate treatment. If a city police department hires only persons who weigh more that 160 lbs., then female applicants are victims of disparate impact because of the adverse impact such a physical requirement has on women. These prohibitions apply to every aspect of employment, from hiring to termination.

Q. Are there exceptions to prohibitions on sex discrimination in employment?
A. Yes. If an employer can prove that the sex of an employee or applicant for a certain position is a Bona Fide Occupational Qualification (BFOQ), then the discrimination may be permitted. However, this exception is very limited. The EEOC has issued guidelines for establishing a BFOQ requiring the employer to demonstrate three basic elements:

1. There must be logical connection between the gender qualification required and the performance of a particular job.
2. The gender qualification must be necessary for proper job performance.
3. The job in question must touch the "essence" of an employer's operation.

Courts have been very reluctant to find sex a BFOQ and have generally upheld it only in obvious cases such as fashion models, wet nurses, or actors.

Another very limited exception exists where a requirement can be justified as a "business necessity." Under this exception, an employer may maintain an employment standard that has an *unintentional* discriminatory impact, as long as (1) the standard is closely related to the ability to perform the particular job, and (2) there is no other way of testing for job ability which would have less impact. For example, a height requirement for pilots is justifiable for safety purposes, even though it has an adverse impact on women.

Q. Assume that a garage owner believes women mechanics are less competent and claims they "just get in the way," and that male mechanics prefer not to work with them. Can the employer hire on a male only basis?

A. No. An employer's stereotypical notions, and the preference of co-workers or customers for members of a particular sex, is not a justification.

Q. Assume a small woman, 5'0" tall and weighing 100 pounds, applies for a job in a warehouse and the employer thinks she is too small to do the job. Can the employer reject her on this basis?

A. No. The U.S. Supreme Court has specifically held height and weight restrictions a violation of Title VII unless the employer can show a BFOQ or business necessity. One reason such restrictions are unlawful is that they affect women more harshly. The other reason is that these restrictions are based on stereotypes of a person's capabilities. Each person is entitled to be evaluated on whether he or she, as an individual, can perform the job. If an applicant cannot perform the duties of the job, the employer can certainly refuse to hire him or her. For example, if a job requires an employee to constantly lift heavy objects, the employer can require that the person that is hired be able to do this. However, an employer can't assume from a person's sex that the person is unable to do it. Each person must have a chance to demonstrate his or her ability.

Q. Can an employer provide married male employees with dependent health care coverage, but deny it to married women, or give women fewer benefits than men?

A. No. An employer must make all benefits available to both sexes on an equal basis. Thus, health insurance benefits must be provided to the spouses of male and female employees on the same basis: benefits for the husband of a female employee must be made available on an equal basis to the wife of a male employee, including pregnancy-related benefits. The U.S. Supreme Court has held that doing otherwise gives married male employees fewer benefits than married female employees.

Q. Can retirement and pension plans be based upon discrimination between the sexes?

A. No. The U.S. Supreme Court has ruled that the contributions made to and the benefits received from pension plans must be equal. Sex-based actuarial tables demonstrating that women live longer than men no longer justify requiring women to contribute more, or paying women fewer benefits per month.

Q. Can life or disability insurance plans discriminate?

A. No. As with other benefits, these should be offered on the same basis to both sexes. If an employer makes contributions to a plan, the contributions must be equal, even though the premiums charged by the insurance company might differ based on actuarial factors involving sex. At least one state, Montana, now

prohibits an insurer from using sex or marital status to determine premium rates and policy benefits.

Q. Can a female employee be passed over for promotion in favor of a man with lower qualifications because the men have more seniority?
A. Probably. Seniority systems are immune from challenge under Title VII even if they might have an unintentional discriminatory impact. However, a seniority system cannot be used as a smoke screen for intentional discrimination. Affirmative action plans to eliminate sex discrimination sometimes come in conflict with seniority systems. (See pp. 50–51 for a discussion of seniority systems as they affect workers over 40.)

Q. Can a female employee be fired because she's getting married?
A. Under Title VII an employer can terminate women who are getting married only if they fire male employees who get married. The policy of discharging employees who are getting married must be applied so as not to discriminate against one sex or the other. Under Title VII marital status is not a protected classification but employment policies related to marriage may give rise to claims of sex discrimination. Several states have laws prohibiting discrimination based on marital status, which means that people cannot be fired or otherwise unfavorably treated because they are married, single or divorced.

Q. What should employees do if they have been discriminated against because of their sex?
A. Usually the employee should talk to the employer first. If this doesn't work, contact the EEOC, the state human rights agency or a lawyer. The procedures for filing a sex discrimination claim under Title VII are the same as for other types of prohibitited discrimination. (See discussion on pp. 34–35.) State sex discrimination laws may provide additional remedies or procedures, so the state employment rights agency should also be consulted.

SEXUAL HARASSMENT

Q. Is sexual harassment unlawful?
A. Yes. Under Title VII and some state laws, sexual harassment is a form of illegal sex discrimination. Some state laws treat sexual harassment as a separate type of offense.

Q. What does sexual harassment mean?
A. The guidelines of the EEOC dealing with sexual harassment in the workplace define it as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

State laws prohibiting sexual harassment generally define it the same way. The

EEOC guidelines say that sexual harassment occurs (1) when employees are made to believe they will lose their jobs if they don't submit to sexual overtures; (2) when they'll lose a promotion or good work assignments if they don't submit to sexual overtures; or (3) when such conduct interferes with the employee's performance or creates an offensive working environment (hostile environment).

Notice that sexual harassment includes not only physical conduct of a sexual nature, but also verbal advances such as requests for sexual favors. More casual advances like occasional touching, off-color jokes or a pattern of repeated sexual references may reach a point which would be considered sexual harassment. It really depends upon the situation, but a combination of the above-mentioned acts could certainly be found to be sexual harassment. Sexual harassment can take the form of vulgar or lewd comments, requiring employees to wear sexually revealing uniforms, physical touching or fondling by one person of an unwilling co-worker, propositions or invitations to engage in sexual conduct, or even embarrassing or humiliating cartoons. The EEOC looks at the "totality of the circumstances" to determine if sexual harassment has occurred, including the nature and frequency of the advances and the context in which they were made. In this connection, a court might rule that evidence about the employee such as promiscuity, provocative behavior, including dress, or publicly expressed sexual fantasies are relevant in a given case.

Q. Does sexual harassment have to result in discrimination with respect to terms, conditions and privileges of employment before legal action is appropriate?
A. Yes.

Q. What does discrimination with respect to "terms and conditions of employment" mean?
A. It means two things. *First*, it means sexual harassment that links concrete employment benefits to sexual favors. Examples would be hiring, firing, job promotion, job evaluation, work assignment, transfer, or any other economic benefit in exchange for sexual favors. *Second*, the U.S. Supreme Court has recently ruled that discrimination with respect to terms and conditions of employment includes sexual harassment which has the effect of unreasonably interfering with an employee's work performance, or *creating an intimidating, hostile, or offensive working environment*. Notice in this second type of violation that a concrete economic benefit need not be affected. Sexual harassment which creates a "hostile environment" is enough for a sexual harassment case.

Q. Will an employer be held liable if a supervisor sexually harasses an employee by giving employment benefits in return for sexual favors?
A. Generally, yes. Supervisors who link concrete employment benefits (i.e., hiring, promotion, discipline, firing, evaluation etc.) to sexual favors are normally held to be acting for the employer. Thus the employer is liable for the acts of its agents.

Q. Does the same hold true for the hostile environment variety of sexual harassment?

A. Not quite. The U.S. Supreme Court recently held that the liability of employers for acts of their supervisors in cases involving a hostile environment, rather than concrete employment benefits or opportunities, will depend upon the circumstances of a given case. A basic question is whether the supervisor is acting as the employer's agent.

Q. If a sexually harassed employee "voluntarily" participates in sexual activity with a supervisor will it prevent a finding of sexual harassment against the employer?

A. Not necessarily. The U.S. Supreme Court has ruled that the employee need only show that the sexual advances or activities are "unwelcome." The Court ruled that the correct inquiry is whether the employee by his or her conduct indicated the sexual advances were unwelcome, not whether his or her actual participation in sexual advances or intercourse was voluntary.

Q. Is the employer liable for acts of sexual harassment against an employee by a co-worker?

A. In the case of a Title VII claim of sexual harassment between fellow employees, an employer is liable only if the employer knows or should have known about the alleged harassment. Even then, the employer may not be liable if it can be shown that immediate steps were taken to correct the situation as soon as it was brought to the employer's attention.

Q. What should an employer do to avoid claims of sexual harassment?

A. Prevention is the best way to eliminate the problem. Here are the steps an employer should take:

a) Develop a written policy expressly addressing the problem of sexual harassment and indicating the employer's disapproval.

b) Develop a prompt and effective grievance procedure for employees to follow if they think they are being sexually harassed. The grievance procedure should authorize employees to go beyond their immediate supervisor in cases where the supervisor is the one involved in the sexual harassment or where the supervisor does not take appropriate action. The procedure should encourage prompt resolution of the problem.

c) The employer should make *prompt* and effective response to complaints of sexual harassment. Effective response can relieve an employer of liability.

d) The employer should take necessary steps to prevent sexual harassment in the first place by circulating/posting the anti-harassment policy, talking about the subject openly instead of waiting for employees to complain, expressing strong disapproval of such conduct, informing employees of their rights to be free from such harassment, developing appropriate discipline against supervisors or co-workers for sexual harassment and posting EEOC guidelines

on the subject.

e) Contact the EEOC for its guidelines on sexual harassment. They will help employers formulate policies against sexual harassment.

Q. If an employer develops an anti-harassment policy with a prompt and effective grievance procedure, will this insulate the employer from liability for sexual harassment?

A. It isn't a guarantee in and of itself. However, the existence of an effective policy can be very influential if not decisive on such things as issues of co-worker harassment, employer responsibility for supervisory acts and issues involving the general credibility of the employer. The key is not only the existence of an anti-harassment policy and procedure, but whether it actually works in a prompt and effective way.

Q. Besides the federal law, are there other prohibitions to sexual harassment?

A. Yes. Several states have their own laws. At least eight states (California, Connecticut, Illinois, Michigan, Minnesota, New York, North Dakota, and Wisconsin) specifically prohibit sexual harassment of employees. Almost every other state prohibits sex discrimination against employees without actually referring to sexual harassment. Generally, state laws and policies tend to follow the federal rules. Also, language prohibiting sex discrimination is increasingly common in public and private sector collective bargaining agreements, which usually include a grievance procedure that winds up in binding arbitration. Thus a sexual harassment grievance might be filed as a violation of the collective bargaining agreement.

Q. Suppose a co-worker gives into sexual advances by a supervisor and gets a promotion that another employee is supposed to get. What can the denied employee do?

A. The other employee should explain the situation to the supervisor's superiors. The EEOC takes the position that an employer may be liable to a third party employee where another employee gains unfair advantage through sexual favors. This is because the denied employee has been the victim of sexual harassment in the sense that the supervisor has used his or her position to reward one employee at the expense of another as a result of sexual favors.

Q. What should an employee who has been sexually harassed do?

A. The employee should *immediately* notify his or her supervisor. If the person doing the harassing is the supervisor, the employee should go to the supervisor's superior. An employer cannot remedy the situation if he or she doesn't know about it. If an employer has a policy against sexual harassment and a grievance procedure designed to resolve sexual harassment claims, the employee should use that procedure. An employee can also file a claim with the EEOC. The procedures are the same as with other types of discrimination (see pp. 34-35),

including the right to sue in federal court. If the state in which the employee resides prohibits sexual harassment, the employee should contact the appropriate state agency.

PREGNANCY AND MATERNITY/PATERNITY LEAVE

Q. Can an employer fire an employee because she's pregnant?
A. No. In 1978, Congress made it unlawful for an employer to discriminate against a woman because of pregnancy, childbirth or any related condition. An employer can't refuse to hire a pregnant woman, fire her because of her pregnancy, or force her to take maternity leave. The law requires that pregnancy and childbirth be treated the same as other temporary disabilities. These conditions must be covered under health insurance plans if other kinds of temporary disabilities are covered. The employment rights of pregnant women, such as reinstatement and accumulation of seniority after giving birth are protected to the same extent as for disabled employees. Some states have specific laws protecting the maternity/pregnancy benefits of employees.

Q. After the baby, can an employee opt to stay home for a couple of months?
A. Unless there are complications from childbirth, a woman seeking extended maternity leave is not considered disabled. Therefore, unless the employer has a policy of permitting such leaves, the employer is not required to provide new mothers with extended maternity leave. However, the law requires employers who generally grant leaves of absence for other personal non-disability reasons to grant maternity leave on the same terms. Such leave is usually limited in time and is without pay. If there is some medical reason for staying off the job, the leave must be treated as any other medical or disability leave. Employees who wish to take extended maternity leave should thoroughly understand the employer's policy. Employees should also check to see if health insurance benefits can be continued during maternity or other leave.

Q. How is reinstatement and accrual of seniority handled during maternity leave?
A. Seniority and reinstatement related to maternity leave must be offered on the same basis as other types of disability leave.

Q. Is an expectant father entitled to paternity leave on the same terms as maternity leave?
A. This is not a settled issue. If an employer provides women who are not disabled with maternity leave, the law may require that the employer do the same for fathers on the same basis to avoid discrimination based upon sex. Normally such leave is limited in time and without pay.

Q. Is an employer required to pay for abortions?
A. The law does not require an employer or its insurance carrier to pay for

abortions which aren't medically necessary. Employers cannot discriminate against women in regard to leave policy or medical leave for complications arising from an abortion, which is considered a "pregnancy-related" condition.

WAGE DISCRIMINATION AND COMPARABLE WORTH

Q. What's the difference between comparable worth on the one hand, and equal pay for equal work on the other hand?

A. "Comparable worth" is frequently confused with the concept of "equal pay." The two ideas are quite different.

Comparable worth says that if job X has the same worth to an employer as job Y, jobs X and Y have comparable worth, and people in the jobs should be paid the same. For example, a secretary might have the same worth to a particular employer as a truck driver. Comparable worth advocates argue that the pay scales for the two jobs should be comparable. Several lawsuits claim that an employer's failure to pay equally for jobs of comparable worth is sex discrimination, violating Title VII. Thus far, the courts have generally rejected this legal theory as a basis of recovery under Title VII or the Equal Pay Act.

Equal pay, on the other hand, is from the Equal Pay Act of 1963, which provides that all persons performing jobs that are the same or almost the same should be paid at the same rate. The Equal Pay Act legally mandates that employees be paid the same regardless of their sex in jobs of equal skill, effort, and responsibility, and performed under similar working conditions. However, the Act permits employers to pay employees differently on the basis of:

1. a seniority system;
2. a merit system;
3. a system based on quantity or quality of production;
4. any factor other than sex.

Several states have their own equal pay laws.

"Pay equity" is a general phrase which refers to the concept of fairness in setting wages. But advocates of comparable worth and feminists often use it interchangeably with comparable worth. The thing to remember is that comparable worth deals with equalizing pay for different jobs while equal pay seeks to equalize pay for the same job. Under current federal law, failure to pay equally for equal work is unlawful; it is not illegal to pay unequal wages for jobs involving comparable work. A few states have laws mandating equal pay for comparable work.

Q. If an employee is paid less than a person of the opposite sex who is doing the same work what can the employee do?

A. First, the employee should try to work the problem out with the employer. If that doesn't work, contact can be made with the EEOC, which has the responsibility for enforcing the Equal Pay Act. A violation of the Equal Pay Act may entitle the victim to an award of double back pay.

Q. Is there a federal law that can help a disabled person find work?
A. Perhaps; it is the Rehabilitation Act of 1973 (Act). The Act prohibits discrimination against handicapped persons and applies to (1) the federal government, (2) federal contractors with contracts in excess of $2,500 and (3) programs receiving federal aid. Many programs receive federal aid, including public agencies, universities, and health care facilities.

Q. Who does the Act cover?
A. The Act covers persons who have a physical or mental impairment which substantially limits one or more of their "major life activities." This broad definition includes virtually all physical disabilities and many mental or emotional handicaps.

Q. What about the state laws for the handicapped?
A. Nearly all states have laws prohibiting discrimination because of a handicap. Some are broader than the federal law and apply to private businesses. Others are limited to state government and its employees. Various states define "handicap" differently. Some definitions are broader than the federal concept, some narrower. One should check with the local/state human rights or labor department for coverage. The federal law is a good place to start, however. It frequently influences state law.

Q. What steps does a person take in cases of discrimination against the handicapped?
A. Federal government workers should turn first to the agency in which they work. A complaint *must* be filed with the agency's EEO office—not the EEOC itself—within 30 days from the discriminatory act. The EEO office generally has 21 days to review the complaint and issue a final determination. The employee then has 15 days to file a "formal" complaint with the agency, if he or she desires. If not, the employee may appeal to the EEOC within 20 days of the final determination. The employee also has a third alternative. If the EEO office takes no action on the employee's complaint, or if the employee is dissatisfied with the EEO office's determination, the employee may file a civil lawsuit within 180 days from the date of the original complaint. However, the employee may not pursue both an appeal to the EEOC and a civil lawsuit. He or she must choose one route or the other.

Those employed by a federal contractor can take complaints to the Department of Labor, which can declare guilty employers ineligible to receive future federal contracts. Normally, an individual in this situation has no right to sue.

For programs receiving federal support, the rules regarding the handicapped are administered by individual federal agencies. For instance, the U.S. Department of Education oversees Rehabilitation Act compliance for schools receiving aid.

A few general statements apply to all agencies. It is enough that a program simply receives federal funds. They need not be earmarked for the handicapped. However, receiving federal funds in a single program may not trigger application of the Act to all operations within an institution or business. If the biology department receives federal funds, the track team won't automatically be covered by the law.

Problems should be channeled through the responsible federal agency. If necessary, an individual suit may be brought. Also, the discrimination in question may be covered under state law.

Q. What are an employer's legal responsibilities toward the handicapped?
A. Under the Act, an employer cannot discriminate because of a handicap. Most states have similar laws. Also, federal agencies and federal contractors are required to take affirmative action in employing qualified handicapped persons. Employers must review their procedures to make sure that handicapped persons are not unjustly discriminated against.

While there is no violation if the handicapped person simply cannot perform the work, the Act and many state laws require employers to make "reasonable accommodations" for the handicapped. This may require reasonable alteration of the workplace or a particular job to allow the person to work. However, employers don't have to undergo "undue hardships" to accommodate the handicapped. The question of what is an undue hardship is determined on a case by case basis.

Q. Must an employer hire handicapped persons even though they are not qualified for the job?
A. No. Under the Rehabilitation Act, an employer need not hire a handicapped person who cannot qualify for the job and is unable to perform the physical requirements of the job. Though employers have to make reasonable accommodation, they are not required to hire a handicapped person who, even after reasonable accommodation for the handicap, cannot perform the duties required by a particular job. The handicapped person has the burden of proving he or she is qualified. These rules may be slightly different under some state laws, but in virtually all cases, an employer is under no obligation to employ a handicapped worker whose condition clearly disqualifies him/her from a job.

Q. Do disabled veterans have any special rights and protections?
A. Yes. However, some current issues are still not very clear. The Agent Orange controversy and the emerging problems of Vietnam Vets Syndrome or Post Traumatic Stress Syndrome may result in greater benefits for disabled veterans. A veteran should contact the Veterans Administration (VA), the U.S. Department of Labor, the state department of labor, or a veterans' support group to find out more about veterans' rights.

Q. Do disabled Vietnam veterans receive any particular protection?
A. Yes. The Vietnam Era Veterans Readjustment Assistance Act requires contractors having contracts of $10,000 or more with the federal government to take affirmative steps to hire and promote handicapped Vietnam veterans.

AGE DISCRIMINATION

Q. Can an older employee, say 55, be forced out of a job in favor of a 30 year-old because the employer wants "young blood"?
A. No. The federal Age Discrimination in Employment Act of 1967 (ADEA) generally prohibits discrimination in employment against persons over the age of 40. Prior to January 1, 1987, the ADEA applied only to persons between the ages of 40 and 70. The age 70 cap was eliminated by the Age Discrimination in Employment Amendments of 1986 (ADE Amendments). The ADEA is similar to Title VII, forbidding discrimination on the basis of age in any aspect of employment, including hiring, firing, or the terms and conditions of employment (including health benefits). It also prohibits discriminatory advertising for jobs (i.e., "under 45," "recent college graduate," etc.). The law protects an employee from retaliation for filing an ADEA claim.

The Act is applied equally to all persons in the protected age group. Thus, it is illegal for an employer to discriminate against a 50-year-old in favor of a 60-year-old just as much as it would be the other way around. Both are over 40, and both are protected.

Q. What about the states?
A. Many states have laws aimed at age discrimination. Often, these are more comprehensive than the ADEA, particularly in prohibiting all age discrimination, regardless of the individual's age. If the state law is narrower than the ADEA, however, a person will still be protected under the federal law, which takes precedence over a narrower state law.

Q. Must an employee retire at age 65?
A. No. ADEA generally prohibits mandatory retirement by employers. Nor can pension plans or seniority systems force retirement. Federal employees face no mandatory retirement age. Some state laws extend job protection to persons of all ages, thus making a mandatory retirement age unlawful in those states. The ADEA provides an exception to this rule for executives or those in important policy-making positions if entitled to retirement benefits of at least $44,000 per year, exclusive of social security; they can be forced to retire at age 65 or any age after that. Also, the ADE Amendments provide an exception for fire fighters, police officers, and prison guards employed by state and local governments, and tenured professors, which exception is to expire in 1993.

Remember, these laws only protect employees from actions taken because of age. Where illness or disability prevents satisfactory job performance, an employee can be forced to retire.

Q. What steps may be taken in cases of age discrimination?

A. First, consultation between employer and employee can work out many misunderstandings. Failing this, contact the EEOC, and—if it handles such problems—a state employment agency or human rights commission. A charge with the EEOC must be filed within 180 days after the discriminatory act has occurred. Where a state agency handles such claims, the charge with the EEOC may be filed within 300 days following the violation or within 30 days after the termination of the state proceeding, whichever is earlier. Under the ADEA, a lawsuit may be filed by an individual who notifies the EEOC of the claim and waits 60 days after such notification before filing suit, which must be brought within two years of the violation. The EEOC acts as an intermediary to settle the dispute between both parties out of court.

Q. What employers are covered by the ADEA?

A. The Act broadly forbids employers, employment agencies and labor organizations from using age as a factor in employment. An employer is defined as someone doing business in interstate commerce and having 20 or more employees, and also includes state and local governments. State laws may cover a broader range of employers.

Q. Are there exceptions to the ADEA?

A. Very few. As with Title VII, discrimination on the basis of age can be justified if it can be shown that age is a Bona Fide Occupational Qualification (BFOQ). (See pp. 39–40.) Here, as with other BFOQ's, the job qualifications must be reasonably necessary to the essence of the employer's business. Age will qualify as a BFOQ where it is shown that all or almost all people older than a given age are unable to perform the job in question and that there is no practical way to differentiate who is qualified among those older than that age. Some recent court decisions have limited the use of mandatory retirement ages because employers couldn't show that age was the only practical way to separate physically fit employees from those who are not fit; other recent cases have allowed more liberal use of the BFOQ exception in occupations involving public safety (i.e., fire fighters, police officers, pilots).

If a job requirement has an unintended effect on older workers, it will be lawful only if it is justified by "business necessity." As with sex or race discrimination, a business necessity is shown where the requirement is related to ability to do the job and where there is no less harmful way to test ability. For example, a hearing test for a school bus driver would probably be lawful even if it disqualified more old workers than younger ones.

Q. How are seniority plans affected?

A. As with Title VII, the ADEA allows discrimination on account of age if an employer is following the terms of a bona fide seniority plan, even if the plan has a negative impact on older workers. For example, if an employer who has only recently begun to hire older workers has to lay off employees on the basis

of a union contract that requires layoff of least senior employees first, this would not violate the ADEA even though the older workers had to be laid off first. In addition, the Act allows some differences on account of age in the funding or benefit levels of bona fide employee benefit plans, such as retirement, pension or health insurance plans. Finally, discrimination is permitted for any "reasonable factor" other than age.

AIDS IN THE WORKPLACE

Currently New York, California and Florida are the states with the greatest number of reported AIDS cases. The law regarding AIDS is currently in a state of change. Therefore the following observations should necessarily be read with the understanding that major changes might take place in the near future. Employers and employees are advised to seek updated information on AIDS from the state health department in the state in which they reside. The following medical information is taken from a report published by the New York State Department of Health entitled "100 Questions and Answers, AIDS." This report is particularly helpful. Moreover, the U.S. Center for Disease Control (CDC) in Atlanta, Georgia, has current information available to both employers and employees. Of particular value is a set of guidelines specifically designed for the workplace which can be obtained by writing Center for Disease Control, National Institute for Occupational Safety & Health, Robert Taft Laboratories, 4676 Columbia Parkway, Cincinnati, Ohio 45226.

Q. What is AIDS?
A. Acquired immune deficiency syndrome (AIDS) is a disease complex characterized by a collapse of the body's natural immunity against disease. AIDS results from infection with the human immunodeficiency virus (HIV). Because of this failure of the immune system, patients with AIDS are vulnerable to one or more unusual infections or cancers that do not pose a threat to anyone whose immune system is working normally.

Q. How contagious is AIDS?
A. Unlike most communicable diseases—colds, flu, measles, etc.—AIDS is not transmitted through sneezing, coughing, eating or drinking from common utensils, or merely being around an infected person for a long time. After five years of experience it is evident that casual contact with AIDS patients does not place others at risk. No cases have been found where AIDS has been transmitted through casual (non-sexual) contact to a household member, relative, co-worker or friend. Health workers and others who care for AIDS patients on a daily basis have not become ill.

Q. Can an AIDS victim be fired because he or she has the disease?
A. Probably not. Developments in New York, California and Florida suggest that, under state law, AIDS will be treated as a handicap. Thus, the states which

have the highest incidents of AIDS suggest a trend to protect AIDS victims from losing their jobs.

Some forty-seven states and the District of Columbia have legislation which prohibits, in some form, discrimination on the basis of handicap in employment. The question of whether or not other states will follow the emerging patterns in New York, Florida and California in treating AIDS as a handicap will be answered during the next decade. Developments at the federal level will no doubt be an influential factor.

In a 1987 case the U.S. Supreme Court ruled that a contagious disease (T.B.) is a protected handicap under the Federal Rebabilitation Act. By implication, a person with AIDS would likely be protected from discrimination on the theory that AIDS is a handicap. At present it is not clear whether this applies to a person who merely tests positive for the presence of HIV. This issue will be settled in the courts in the near future.

See pp. 47–48 for a general discussion of the Rehabilitation Act's coverage and application.

Q. If AIDS is considered a handicap by the courts, what will this mean practically speaking?

A. Generally, it means that employers may not discriminate against individuals with AIDS or who are perceived to have AIDS unless the employer could show "a reasonable probability of substantial harm" to co-workers or others in light of the current medical opinions about the disease's communicability.

Some legislation is specifically directed to the AIDS problem. For example, California, Wisconsin and Florida have legislation which prohibits the use of the results of certain blood tests in making employment decisions. Moreover, public health laws which encourage and provide AIDS testing centers usually have provisions requiring that test results be kept confidential.

Q. Will an employee with AIDS be covered under a health insurance policy?

A. This should be checked with the insurance carrier and employer. Some states have passed laws limiting an insurance carrier's ability to exempt AIDS coverage. The insurance industry is greatly concerned over the increased medical costs brought about by AIDS.

Q. What is the best thing for an employer to do?

A. First, assign someone in the company or organization to be responsible for informing management on current developments. BURAFF Publications, Inc. has a very informative biweekly publication entitled "AIDS Policy and Law." Inquiries should be directed to BURAFF at 1231 25th Street, N.W., Washington, D.C. 20037. The Center for Employment Relations and Law has available an employer guide, "AIDS and the Workplace," that can be ordered from CERL, College of Law, Florida State University, Tallahassee, FL 32306.

Second, consider hiring a medical consultant familiar with AIDS or contacting

the state or local health officer in charge of AIDS for advice.

Third, consider whether general company guidelines or policies should be developed. Again, CDC, your state health authority, or other companies or organizations may have developed guidelines. It might be helpful to write appropriate health authorities in New York, California, or Florida.

Fourth, begin to educate your employees. Public health authorities and the CDC have materials which you can distribute to your employees.

Fifth, do not overreact if an AIDS problem develops in your company workforce. Before making a decision, seek expert legal and medical advice as to the appropriate action to take under the circumstances. Thus supervisors and middle level managers should be instructed to refer the matter to a higher authority.

OTHER TYPES OF DISCRIMINATION

Q. Can an employee be fired because of religious affiliation?

A. No. Government employees enjoy the First Amendment guarantee of freedom of religion, which protects them from discrimination on the basis of religion. Private employees are protected by Title VII, which prohibits religious discrimination in employment.

Q. Are just the mainstream religions protected?

A. No, the protection runs to any beliefs which are sincerely held. They need not be part of an organized religion. However, social ideology, such as white supremacy, or economic theory, such as communism, do not constitute religious belief.

Q. Does an employer have to accommodate a Seventh Day Adventist by letting him or her off to observe the Sabbath on Saturday?

A. That depends on the facts in the particular situation. An employer need only accommodate religious beliefs to a certain extent. If accommodation results in significant cost or hardship to an employer, either directly or indirectly, the employer need not oblige an employee. Finding a replacement worker for Saturday, probably at overtime rates, might be considered too significant a cost for an employer to bear.

Q. How should an employee pursue a religious discrimination complaint?

A. First, try to work it out with the employer. If that doesn't work, contact the EEOC.

Q. Does Title VII protect the employment rights and opportunities of homosexuals?

A. No. Title VII only applies to discrimination on the basis of race, color, religion, national origin or sex. Sex discrimination does not include sexual orientation.

Q. Do any federal laws protect gay rights?
A. Not specifically. Government employees enjoy some protection, since the Constitution requires that government treat all public employees equally. Thus, government employers may violate the Constitution by firing a gay employee without job-related justification.

Q. What about state and local legislation?
A. A few states and counties, and many cities, have passed laws protecting gays in public employment. Some extend this protection to employees of private businesses contracting with the government. Check your own state, county and city laws to determine if there are any such protections.

Q. What about private businesses?
A. Some businesses have policies against discrimination based on sexual preference. Also, some unions, such as the Screen Actors Guild, have negotiated protections in their collective bargaining agreement. Other than that, employment law rarely protects gays.

Q. What law governs the employment of non-citizens?
A. The Federal Immigration and Naturalization Act (INA). This is a very technical and complex area of the law, and employers and employees should seek expert help if a question arises.

Q. What are the categories of aliens?
A. The law deals differently with *non-immigrant* aliens, those in the U.S. temporarily, and *immigrant* aliens, those remaining in the country who may eventually become citizens. In order for a non-immigrant alien to be eligible for employment, he or she must be here under a visa which authorizes specific employment. There are several types of visas authorizing temporary employment, each containing particular limitations and conditions. Immigrant aliens are admitted because (1) they are in one of four family relationship categories or (2) because they are in one of two employment-related categories.

Immigrant aliens cannot enter in an employment category unless the U.S. Department of Labor certifies that no American workers are willing, able, and qualified to perform the job the alien will fill, and that working conditions and wages of similar American workers will not be affected. Because of these requirements, it is sometimes difficult for a company to hire an employee who is not a citizen.

Q. Can an employer get into trouble for hiring an illegal alien?
A. Yes. In 1986 Congress passed the Immigration Reform and Control Act of 1986 (IRCA). IRCA makes it unlawful for an employer to hire an "undocumented" alien, and provides sanctions for an employer who does so. IRCA applies to *all employers*.

Q. How is an employer supposed to know if an employee is an illegal alien?
A. IRCA contains a documentation procedure which the employer is to follow for *all employees—not just those that appear to be Asian, Hispanic or another nationality.* The employer must fill out an employment eligibility form (Form I-9) for each new hire. The Form I-9 contains a checklist of documents which the employer may accept as evidence of an applicant's legal status. The best documents to rely on are a U.S. passport, INS-issued certificate of U.S. citizenship or naturalization, a resident alien card with photographs or an unexpired foreign passport with valid work authorization. If these documents are not available, then the employer must rely on a combination of other documents such as a birth certificate, driver's license and social security card. At the end of the form I-9 the employer must sign an oath that he or she believes, under penalty of perjury, that the documents provided by the applicant or new hire are valid. Neither IRCA nor the INS rules adopted under IRCA require the employer to keep copies of the supporting documents on file.

Q. What can happen to an employer who hires an illegal alien?
A. Before May 31, 1988, the first time an employer knowingly hires an illegal alien, he or she will receive a warning. For the next offense the employer may be fined $250 to $2,000 per employee, for the second offense a fine of $2,000 to $5,000 per employee and for the third a fine of $3,000 to $10,000. Repeat offenders can receive additional fines and imprisonment. After May 31, 1988, no warnings will be issued to first-time offenders.

Q. Must an employer fire or document an alien that has been working for several years?
A. No. IRCA applies only to those hired after November 6, 1986, when President Reagan signed the bill into law. An employer may be held responsible for employees hired after November 6, 1986, and who remain employed through June 1, 1987. An employee who entered the country prior to January 1, 1982, may be eligible for legalization under IRCA's amnesty provisions.

Q. What must an alien worker do to qualify for amnesty?
A. This may be no easy task. First, the worker must prove that he or she entered the country prior to January 1, 1982. This may be demonstrated by presenting utility bills; medical, hospital or school records; attestations from church or union. However, because many aliens have lived under aliases and have attempted to avoid detection, producing such documentary evidence may be tough. Second, the worker must show "continuous" residency. A single absence of 45 days or total absences of 180 days would render an alien ineligible. Third, a worker must demonstrate that he or she is self-supporting and will not become a "public charge." Thus, if an alien has applied for public assistance, his or her eligibility may be lost. Finally, the alien must be able to pay the INS the $185 application fee, and will likely pay several hundred dollars more for other services in applying.

Q. Can't an employer just fire an employee he or she suspects is an illegal alien?
A. No. IRCA contains anti-discrimination provisions prohibiting employment practices based on national origin or non-citizenship status. In addition, Title VII may prohibit such action. Importantly, IRCA's anti-discrimination provisions are much broader than Title VII, covering employers with *four or more employees*, and *covering all employees*, not just those who work 20 calendar weeks.

Q. Do any other laws affect employment of aliens?
A. Title VII's prohibition against national origin discrimination does not mean that employers have to employ non-citizens as well as citizens, but it does mean that an employer can't discriminate between groups of immigrants. For example, it is lawful to have a policy of not hiring any non-citizens, but is unlawful to hire Oriental aliens while refusing to consider Hispanic aliens.

The National Labor Relations Act also applies to these employees. Alien workers, regardless of their immigration status or even their illegal presence in the country, are protected by the NLRA and have the right to organize and participate in unions.

Unique Rights of Government Employees

Q. What constitutional rights do government employees have?
A. Federal, state or local government employees have some unique protections because their employer—the "government"—is restricted by the U.S. Constitution. State and local governments are also restricted by their state constitution; local governments are restricted by local charter or constitution. Civil service laws and collective bargaining agreements are also a source of protections.

No one has a right to be employed by the government—you can't demand a job. However, once you apply for a job with the government, the government can't treat you in an arbitrary or discriminatory way in making employment decisions. The government employer must have a reason for its action and this reason must be related to a legitimate purpose of the government.

An inadequate reason in one case might be sufficient in another. For example, it would be unconstitutionally "arbitrary" for a Commerce Department records clerk to be fired because her supervisor doesn't like the clerk's hair style. On the other hand, a police department can legally maintain a grooming code because of its legitimate interest in maintaining discipline and a neat appearance among its personnel.

These constitutional limitations also mean that public employers must have a legitimate reason for imposing upon an employee's private life and relationships. A government employer cannot usually take action which interferes with employees' freedom of speech or religion, their right to associate with individuals or groups, or their right to be secure from unreasonable searches.

Q. What are "civil service" laws?

A. All levels of government—federal, state and local—operate employment systems, and use some form of civil service or merit system which rewards employees' qualifications rather than political affiliation. Because some positions should be political, most merit employment systems allow elected officials to fill some high-level positions with persons whose views are compatible with their own.

Q. Who do civil service regulations cover?

A. Each level of government (federal, state, local and municipal) typically adopts its own civil service or merit system which covers its employees. Under a civil service system, state, federal or local government employees may have considerably greater job security than the average employee. Besides prohibiting the types of discrimination covered by Title VII, civil service systems sometimes prohibit other types of discrimination, such as marital status. Most important, virtually all civil service laws provide that an employee can't be fired except for good cause. This standard can be very difficult for an employer to prove. In addition, the employer must follow specific procedures to discipline or fire employees. Finally, there usually is some kind of administrative board (Civil Service Board, Merit Systems Protection Board, etc.), to hear disputes over discipline or discharges, with court review of that decision available.

Q. What protection does a collective bargaining agreement provide public employees?

A. First, employees and the employer must have negotiated an agreement. Most states have statutes providing for collective bargaining by some or all state and local government employees. (See discussion on pages 31-32.) If employer/employees are governed by a union contract, then there may be rights and benefits protecting employees, in addition to those mentioned above.

Performance Reviews and Discipline

Q. If an employer uses performance reviews to determine raises and promotions, what guidelines should it follow in using these reviews?

A. The Equal Employment Opportunity Commission has declared these reviews to be "tests" subject to the same standards as pre-employment testing. This means that 1) they must be job-related; 2) they must not discriminate against any protected class, such as minorities or older workers; and 3) the supervisor must have adequate knowledge both of the job and the person being reviewed. Reviews and evaluations that rely on subjective determinations alone are suspect, because they could easily be used to hide discrimination. Therefore, it is best if evaluations are based on objective factors.

Q. Is an employee allowed to see his or her performance review?
A. That depends on the employer. No federal law requires employers to show the review to the employee, but some state laws give employees the right to periodically review their personnel records, including evaluations. Most companies have the employee read and sign the review, since this practice protects the company against charges of arbitrary reviews. If you want access to your review, check your company's policy first, and then any state laws.

Q. Are employee reviews confidential?
A. Generally, no. No federal law says that private corporations or state and local governments have to keep files confidential. Some state laws require employers to give notice to an employee or to obtain an employee's consent before anyone else is given information about the employee. An employee of the federal government may be protected by the Privacy Act of 1974 if the employee does not consent to review of the records by a third person.

Q. How much discretion does an employer have in disciplining an employee?
A. It depends. Government employees or employees who are represented by a union fall under civil service laws and/or a collective bargaining agreement. In these situations, discipline must generally be for just cause related to job performance; the severity of the discipline must correspond to the seriousness of the misconduct; and discipline must often be progressive, becoming more severe with repeated instances of misconduct or poor performance.

If employees and employer are not bound by civil service rules or a union contract, the guidelines are less clear. If there is a written company policy regarding discipline, an employer may be bound to follow the rules and procedures laid out in the policy. A company's disciplinary actions generally should not have a more negative impact on minorities or women. Finally, discipline ordinarily can't be retaliatory. Many laws specifically prohibit an employer from taking action against an employee for union activity, informing a government agency of illegal behavior or engaging in other such "protected" acts.

In general, an employer has a good deal of discretion and there is not a lot that can be done by an employee even if the discipline seems unfair. As in other cases, employer and employee should attempt to amicably resolve disciplinary problems.

Out of Work 3

Unemployment is never welcome, but the law can provide some comfort. First of all, the law gives some workers protection against losing their job. For those workers who do lose their jobs, the law provides various kinds of assistance, depending on the kind of unemployment.

You can lose your job for many reasons. You can be laid off, fired, disabled or you can quit. (You can also retire, which is the subject of the next chapter.) Each of these alternatives raises different legal considerations.

Job Security

Many employees are employees "at-will." This means that the employee may be terminated at the will of the employer without notice and for any reason or no reason. Similarly, the employee may quit a job without notice and for any reason or no reason. An employee at-will is generally found in the private sector.

Q. Are there exceptions to the employment at-will rule?

A. Yes. Employees who are covered by a collective bargaining agreement generally cannot be dismissed without just cause, which is provided for in the agreement. Employees who have a written, fixed-term employment contract cannot be terminated except as provided in the contract. Government employees—whether federal, state, local, or municipal—who are covered by civil service laws can generally be dismissed only for just cause. In addition, in over 20 states the courts have fashioned a "public policy" exception to the at-will rule. This exception arises where an employer fires an employee for a reason that violates

a basic public policy—for instance, the employee's refusal to engage in an illegal activity. Some state laws also provide protection for "whistle blowers."

Q. What is a "whistle blower"?
A. A whistle blower is an employee who discloses—"blows the whistle on"—acts by the employer which are illegal or which violate other regulatory guidelines. Traditionally, employers could retaliate against whistle blowers by firing them. This is still the case in many states, but recently a few state courts and legislatures have fashioned legal protections for whistle blowers.

Q. Do any other laws protect at-will employees?
A. Yes. The employment at-will rule exists in the context of other legal protections, such as the NLRA, Title VII, the OSH Act, ADEA and other state and federal civil rights laws. That is, even employees who do not fall under one of the exceptions to the at-will rule discussed above still cannot be fired because of their race or sex.

In addition, there is the legal action known as "wrongful discharge" which has been adopted in a number of states. Under this theory an employer may be sued for discharging an employee for particular reasons or in certain circumstances. For instance, suppose an employer were to insist that an employee commit an illegal act in carrying out his or her job and the employee refused to do so. If the employer were to fire the employee, the employee might have a right of action against the employer. Or, an employer may promise, directly or indirectly, in an employee handbook or other document, or orally, to discharge employees only for just cause. If the employer then fires an employee without just cause, the employee may be able to sue. State and federal laws also provide many limitations in firing an employee in particular situations. While wrongful discharge is not available in all states or situations, an employee should seek appropriate legal advice about his or her particular circumstances.

Q. Is an employer always required to give an employee notice before firing him or her?
A. Not necessarily. If an employee is under contract or belongs to a union, there is probably some sort of notice requirement, and if there are formal discharge and disciplinary procedures the employee will already know that discipline is underway. Generally, at-will employees are not entitled to notice. However, some companies maintain a policy of providing notice prior to discharge. If so, an employee might have a legal right to notice.

Q. Is an employer required to provide severance pay?
A. Some employees will be covered by individual contracts or collective bargaining agreements that provide severance benefits. At-will employees generally have to rely on the generosity of their employer, although some state laws require severance pay under certain conditions.

Q. What is the difference between being laid off and being fired?
A. The difference can be very important. When fired, an employee's relationship with the employer is completely severed because the employee is deemed unsatisfactory in some respect by the employer. The employee may be eligible for certain benefits, such as severance pay, but may lose eligibility for others, such as company insurance. When laid off, an employee can be considered satisfactory, but is laid off because of a work shortage or economic difficulty. A layoff may be temporary, or for an indefinite period which effectly terminates the employment relationship. Whether the employee receives any benefits depends on the company's layoff policy or the union contract. Implicit in being "laid off" is the notion that you will be back at work if the company again expands the work force. However, layoff policies contain a cut off point, after which an employee loses any seniority or re-employment rights. If employees are told not to come in, they should distinguish whether they have been fired or laid off, and should inquire as to their rights in each situation.

Q. Can a company fire or lay off employees based on their race or sex?
A. Federal laws prohibit termination based on race, color, religion, sex, or national origin; age; a handicap under certain conditions; veteran status under certain conditions; and citizenship. Terminations or layoffs which adversely affect any of these groups without some proof of validity are discriminatory regardless of whether or not they are intentional.

Q. Isn't a seniority system discriminatory?
A. No. Seniority systems are valid as long as they are not *intended* to harm any of the classes mentioned above. Also, seniority systems which are currently impartial and non-discriminatory are valid even if the effect during a layoff is to "freeze-in" past discrimination.

Unemployment Benefits

Q. What is the purpose of unemployment insurance?
A. Unemployment insurance (UI) provides workers and their families with weekly income to help them through unemployment which is no fault of their own. When out of work because of such things as plant closures, layoffs, natural disasters, or other acts or circumstances for which the employee is not at fault, employees are entitled to unemployment insurance.

Q. Who administers the UI program?
A. The unemployment insurance program is administered by both the federal and state governments. The federal government has regulations that every state follows in providing benefits to unemployed workers, and the states have rules as well. Although certain federal standards and guidelines apply for all states,

unemployment programs differ widely from state to state.

Benefits are paid to workers by each state's employment security agency, and are funded by employer payments of federal unemployment taxes. In addition, many states provide varying benefits which are funded by state taxes on employers.

Q. Are there other UI programs besides this federal-state effort?
A. Yes. One such program is the Disaster Unemployment Assistance Program. Supplemental unemployment benefits are included in many collective bargaining agreements, such as in the automobile industry. Supplemental programs are funded by the employer and are paid in addition to government UI benefits.

Q. How does one know if he or she has UI coverage?
A. Check with the state employment security agency. Under most state laws, to be eligible for benefits a person must work for someone else; self-employed persons are generally not covered. An employee must work a certain minimum amount of time, which is fixed by the states. Certain jobs generally aren't covered, including casual (temporary) laborers, minors working for their parents and student interns.

Q. When is an unemployed worker, assuming he or she's covered, eligible for UI benefits?
A. It depends. Employees must be out of work through no fault of their own. This means that the employee didn't voluntarily quit his or her job, and wasn't fired for "misconduct," such as insubordination or violation of a company policy. Many states will allow unemployed workers to collect UI benefits if they quit for "good cause." What constitutes "good cause" varies greatly among the states. Some states allow the unemployed to collect UI benefits if out of work for personal reasons, such as having to care for a sick relative or following a spouse who has found employment in another state. Most states, however, require that "good cause" be in some way attributable to the employer's action, such as workplace conditions so intolerable that they would cause any reasonable person to quit. The "reasonable person" standard should be stressed here. It is not enough that a situation is intolerable to a particular employee. The conditions must be such that a reasonable person, in the same position as the employee, would also feel compelled to quit.

Q. Are striking employees entitled to UI benefits?
A. Generally, no. Even a union member who does not support a strike generally will not receive benefits. However, if permanently replaced during a strike, an employee may then become eligible. Some states deny benefits for a fixed period of time, and then provide benefits if the strike continues and the striker is available for work. A few states provide complete benefits to strikers, if they are available for other work. In addition, a "strike" may be treated differently than

a "lockout." One should contact the local unemployment office for application of a particular state's UI law.

Q. When can a worker refuse a job offer and still get UI benefits?
A. A worker need not take a job if it is not "suitable work." Generally, a job is not suitable if the employee has no experience in the job; if the job is more hazardous than the former job; or if age or physical condition prevents the worker from accepting it. Transportation costs and time, unfavorable working hours, prevailing community wage levels and other compelling personal problems may also be taken into account. Finally, workers usually can't lose benefits for refusing to take a new job that's available because of a strike, or one that would require them to join or quit a union over their objection (in some states).

If wages and conditions of an offered job are below those of a former job, the worker may not be required to take it, depending on the state's definition of "ready, willing and able" to work. For example, a skilled craftsman would not be required to take a job as a janitor. However, most states require that after a certain period of time the employee accept even a lesser job. One should check one's state law for a particular time limit, if any.

Q. What should a laid-off worker do to apply for UI benefits?
A. As soon as possible, apply at the state unemployment office. When filing for benefits, one should bring along a social security card, pay slips, and other documents demonstrating that one is unemployed and eligible for benefits. One should register for available work through the employment office. In most states there is a waiting period before collecting benefits (usually one week). After filing, report to the employment office periodically (usually every week), and report when notified of job opportunities. Failure to report without good cause could result in a loss of benefits.

Q. How long do UI benefits last and how much is paid?
A. The usual maximum is 26 weeks, but it is sometimes longer, depending on the state. The amount of benefits varies by state, and depends on the earnings of the worker. UI benefits are usually quite low. Check with the state unemployment office for specifics.

Q. What happens if a worker moves to another state to look for work? Can UI benefits still be collected?
A. Yes. Every state is a member of the Interstate Reciprocal Benefit Payment Plan, under which a person may register for work and file for UI benefits in a different state. However, it is the law of the state in which the worker was employed which applies to the worker, and its requirements must be satisfied in order to receive UI benefits in the new state.

Q. Can an unemployed worker receive other benefits or earn extra money while collecting UI benefits?
A. Some states disregard small amounts of money earned while receiving UI benefits. However, income above a certain very low level will usually be deducted from UI benefits. Most states reduce or eliminate UI benefits for weeks in which disability benefits, severance pay, and other types of income are received. The state UI office has information on the permissible types and dollar amounts of income.

Social Security Disability

Q. Can an employee who becomes disabled receive Social Security benefits?
A. Yes, if the employee is in a job covered by the Social Security system, and has worked the required number of quarters to be fully covered. These requirements are discussed more fully in the section on Social Security retirement benefits.

Q. Can a disabled worker's spouse and children receive benefits as a result of the disability?
A. If spouse and children meet the requirements for retirement benefits under Social Security, they should also qualify for disability benefits.

Q. What is considered "disabled" under Social Security?
A. This depends on the nature of the disability. Some impairments and diseases are considered so serious that, if a person suffers from one of them, he or she is automatically considered disabled. Examples are loss of vision or hearing, and severe epilepsy. These are contained in a "list of impairments" compiled by the Social Security Administration (SSA). If workers do not suffer from a listed impairment, they can still prove that they are disabled by showing that the condition or disease suffered from is the medical equivalent of a listed impairment. The condition or disease must be equal in severity and duration to a listed one.

Q. What if a worker doesn't suffer from the medical equivalent of a listed impairment?
A. Workers may prove that they are disabled in another way: by showing that the condition or disease is so severe that it prevented the performance of their former job or any other comparable work. It is not easy to meet these requirements.

Q. Where does one apply for Social Security disability benefits?
A. At the local SSA office. To show a disability, a person should submit a medical history along with a detailed statement from a doctor as to why he or she is disabled. He or she should also submit information about work history, edu-

cation, and so forth. This will be used by the SSA to determine whether the condition is disabling. Statements from family and friends may also be submitted to prove a disability.

Q. What happens if an application for benefits is rejected?
A. The appeals process for rejected applications is explained in the section on Social Security retirement benefits (see pp. 69–71).

Workers' Compensation

Q. What is workers' compensation?
A. This general term describes various laws compensating workers and their families for work-related injuries, diseases, and deaths. Workers' compensation provides at least minimum compensation for injuries sustained in the workplace. All states have some type of workers' compensation. These laws vary but are similar to each other. They were passed early in this century because injured workers had great difficulty winning lawsuits against their employers. In response to public outcry, the states passed workers' compensation laws.

Q. Are all workers covered?
A. Most employees are; some states exempt certain categories of workers, while others make coverage optional for the employer. An employee can check with the state department of labor (or its equivalent) to determine if he or she is covered.

Q. If an employee is injured on vacation, will he or she be covered by workers' compensation?
A. No. Workers' compensation covers only injuries connected to the job. This can range from being injured by a defective piece of machinery to being accidentally hit by a truck entering the loading dock.

Q. Can employees who work with toxic chemicals that cause cancer or some other illness be covered under workers' compensation?
A. The law varies from state to state. Employees should consult a lawyer to find out if they are covered. Some types of "occupational diseases," such as black lung disease, are now covered by state laws, but only if the job presents a greater risk of getting the disease than other jobs.

Q. Generally, how does workers' compensation work?
A. Employees are entitled to receive benefits for all injuries resulting from the job, even if they are at fault. Families will get benefits if the employee dies as a result of an injury.

Workers or their dependents get a fixed weekly benefit to compensate for the

injury, the size of which depends on the worker's regular salary. The worker is thus assured of some income. The cost of providing workers' compensation falls solely on the employer—it cannot be deducted from wages. Employers typically purchase workers compensation insurance.

In return, the employer gets some benefits. If employees are covered, they can't sue the employer. (In many states, though, the employee can still sue any other negligent parties that may have been involved, such as co-workers, manufacturers of defective machinery, etc.)

Q. What kind of benefits does an employee get under workers' compensation?
A. This depends on the extent of the injury. Generally, an employee can recover the costs (up to a maximum amount fixed by law) of hospitalization, medical care, etc., which result from the injury and costs for any necessary rehabilitation. Also, an employee may receive weekly disability benefits, depending on whether the disability is temporary or permanent, total or partial. These benefits are based on previous wages and usually amount to approximately one-half of the weekly wages. Separate from this, an employee may receive "scheduled," or fixed, benefits for loss of an organ, limb or other body part.

Q. One reads about huge amounts awarded in lawsuits for "pain and suffering." Can an employee recover money for this under workers' compensation?
A. Generally, no. Disability benefits are usually all an employee gets, even if pain and discomfort are very severe. The law gives the employee enough to pay bills, but is not intended to compensate for damages or punish the employer.

Q. After an injury at work what should an employee do?
A. Go straight to the employer (after getting treated of course), or otherwise notify the employer as soon as possible after an injury occurs. Then file a claim with the state agency administering the workers' compensation plan. If an employer contests a claim, a hearing will give all parties a chance to be heard. The employee or employer may appeal an adverse decision to the agency and, if not satisfied, sue in state court.

Q. Must a claim be filed within a certain amount of time?
A. Yes. Each state has a legal time limit for filing claims. Claims should be filed promptly to avoid losing rights.

Q. What happens to an employee not covered by a workers' compensation plan?
A. If not covered, the employee has the right to sue the employer, but must show that the injury resulted from the employer's negligence.

Special Disability Plans

Q. If an employee isn't covered by workers' compensation or social security, and is not a veteran, do any other programs apply?

A. Possibly. Several state and federal programs, such as one covering longshoremen, provide compensation for work-related injury, disease, and death in specific circumstances. Contact the U.S. Department of Labor and the state labor agency to find out whether any special compensation programs might benefit you.

Planning for Retirement 4

Social Security

Q. There is currently some debate about changing social security requirements and payments. Is there any guarantee that the present requirements will be kept the same?

A. No. The social security program is likely to remain a hot topic as more and more Americans reach retirement age and increase the financial strain on the system. The requirements discussed below may change at any time. For current information, contact the local Social Security Administration (SSA) office.

Q. Who is covered under social security?

A. Social security now covers nearly all workers in the United States, except federal government employees, railroad workers (who are covered by the Railroad Retirement Program), and certain state and local government employees. Social security covers workers not ordinarily covered by other federal programs, such as domestic and farm workers, and self-employed persons.

Q. Does a person in one of the covered categories automatically receive benefits?

A. No. Workers must meet certain basic requirements before they can receive social security benefits. First, a worker must work a minimum number of calendar quarters, earning a certain amount of money, to be eligible for any benefits. The number of quarters that must be worked depends on the type of benefit. Survivor benefits generally require the least number of quarters, retirement benefits usually require the most. The current work requirement for a person who turns 62 in

1991 or later is 40 calendar quarters (10 full years) to receive retirement benefits. Besides the work requirement, workers are covered only if their employer pays the legally required taxes into the social security program, which include amounts deducted from employee pay and the employer's required contributions.

Q. What benefits are available under social security?
A. Three basic types of benefits are available: 1) retirement and disability benefits payable to a worker; 2) benefits for spouses and children of a retired or disabled worker; and 3) survivor benefits for the surviving spouse and children of a deceased worker.

Q. When can an employee start drawing benefits?
A. Currently an employee can start receiving benefits if retired at age 62. The longer one delays retirement, however, the larger the monthly benefit received.

Q. Will social security benefits be enough to maintain the present standard of living when an employee retires?
A. Probably not. The benefits under social security are designed to provide a basic level for all qualified workers and their families. This level is not very high, and some other form of income, such as an Individual Retirement Account (IRA), pensions, investments, or a part-time job after you "retire," may be necessary.

Q. Can a retiree earn money and keep social security benefits?
A. Yes, up to certain amounts. If you earn more than the specified amount from employment, your benefits will be reduced by $1 for every $2 you earn above the limit. Stock dividends, pensions, interest from savings accounts and certain other types of income are excluded in determining whether you have earned above the legal limit. To find out what the current limit is, contact the local SSA office.

Q. Can a person collect social security benefits based on the length of time a spouse worked?
A. Husbands or wives may sometimes receive retirement benefits based on the work record of their spouse. It depends on the circumstances. Similarly, these benefits may or may not be in addition to benefits received based upon one's own work record. This will usually amount to one-half of the benefit the spouse is entitled to receive. If a wife is entitled to $300 a month, her husband would be entitled to $150. A husband no longer has to prove that he is dependent on his wife in order to draw retirement benefits based on her record.

Q. Can a person who divorces his or her spouse after twenty years of marriage receive retirement benefits from social security based on the spouse's work record?
A. Under certain conditions. The spouse has to be at least 62; the parties must

have been married for at least 10 years; and the spouse must be unmarried at the time that the person applies for benefits.

Q. Will children in high school be eligible for the benefits of their parents?
A. Yes, they will be eligible for benefits if they are dependent, unmarried, and are under 18 (or 19 if they are full-time high school students). As with a spouse, the amount of the benefits is one-half that of the worker's. This also covers stepchildren, adopted children, and, under certain circumstances of dependency, grandchildren.

Q. What happens if a worker entitled to benefits dies?
A. The surviving spouse and dependent children are eligible for survivor benefits. In order to qualify for full benefits, a surviving spouse must be age 65 or older (partial benefits may be available at age 60, unless disabled, then between 50 and 60), and must have been married to the deceased worker at least nine months (there are certain exceptions to this), the deceased worker must have been fully covered at the time of death, and the surviving spouse must be unmarried or must not have remarried until over 60. A younger surviving spouse can receive benefits for caring for the deceased worker's surviving dependent children. The benefits for surviving children are three-quarters of a worker's full payment.

Q. How does a claimant receive social security benefits?
A. A claimant must apply for benefits with the SSA. Applications and information about the application process can be obtained from the local SSA office. The SSA office can also provide information about documents and details the applicant will need to make available to SSA. Applications are processed and either approved or rejected.

Q. What happens to an application that is rejected, or if the benefit level is incorrectly determined?
A. There is a multi-step appeals process. The first step is "reconsideration" of the application by the SSA. If the application is still not accepted, the applicant can then request a formal hearing in front of an administrative law judge. If this ruling goes against the applicant, the applicant can request a review by the Social Security Appeals Council in Washington, D.C. If the council decides against the applicant, he or she can sue in federal court.

Pension Plans—ERISA

Q. Does the law require an employer to give an employee a pension?
A. No. Employers don't have to set up a pension plan for employees. However, a plan covered by the federal Employee Retirement Income Security Act (ERISA), that is established by an employer alone or jointly with a union must meet certain

minimum standards. ERISA applies to plans that are "qualified" under the federal tax laws, and/or that have an impact on interstate commerce. The tax laws provide significant advantages for qualified plans, thus most pension plans fall under ERISA.

Q. What is the purpose of ERISA?
A. ERISA protects workers (and their beneficiaries) who participate in pension plans. Since 1975, ERISA has superseded all state laws covering pension and other employee benefits plans, except for state laws regulating insurance, banking or securities.

ERISA deals with the following aspects of pension plans:

1) Participation;
2) Vesting, benefit accrual, and breaks-in-service;
3) Funding;
4) Administration of funds;
5) Reporting and disclosure;
6) Joint and survivor provisions;
7) Plan termination insurance.

ERISA sets legal minimums. While an employer's pension plan may provide more liberal terms, it must provide at least the terms set forth in ERISA.

Q. What are the participation provisions?
A. Before ERISA, many pension plans excluded large groups of workers. Typical reasons were that they were part-time workers, had not served long enough with the company, or were not old enough. Now, under ERISA, employees generally must be allowed to participate in a pension plan if they are at least 18 years old and have completed one year of service (a 12 month period during which an individual has worked at least 1,000 hours). Workers generally may not be excluded from a plan because the employer considers them to be too old.

Q. What are the vesting, benefit accrual, and break-in-service provisions?
A. Benefit accrual merely refers to the process of building up benefits once an employee qualifies for a pension plan. Vesting refers to the point after which employees' accrued benefits cannot be denied. If an employee returns or has a break in service before benefits "vest," he/she will not be entitled to the benefits, except for contributions made out of his/her own pocket.

Normally employees start building up benefits as soon as they begin participating in a pension plan. An employer is required to give participating employees at least partial pension credit if they work 1,000 hours in a year.

As for vesting, ERISA allows different plans. One basic design allows a plan to require a full ten years of service before the employee is entitled to any part of the pension, as long as the benefits become 100% vested after ten years of service. Other provisions allow a plan to require 15 years before benefits are 100% vested, but partial vesting must begin after five years of service and the

benefits must be at least 50% vested after 10 years of service and 100% vested after 15 years, regardless of how old the employee may be.

If a break-in-service occurs before benefits are vested, the benefits are lost. If an employee works fewer than 500 hours in a year, the employer can say a break-in-service has occurred. What happens then depends on whether and to what extent an employee's benefits have vested, what type of pension plan it is, and how long the break-in-service is. Employees should check with their employer to determine how a break would affect them.

Q. Does this mean an employer could avoid paying an employee's pension by firing him/her before it vests?

A. ERISA makes it illegal for employers to discharge employees or to force them to quit if the purpose is to avoid paying benefits or to prevent accrued benefits from vesting. However, an employee can lose non-vested benefits if terminated for other reasons.

Q. What are the funding provisions of ERISA?

A. Generally, these require that enough funds be contributed by employer and employee to cover pension withdrawals when they become due. Funding provisions are designed to strengthen pension funds and prevent abuses. These requirements basically must be met by the employer and the fund's administrator.

Q. I've heard of scandals involving misuse of pension funds. What does ERISA do to prevent this?

A. Those who administer pension funds under ERISA are required to use "care, skill, prudence, and diligence" in managing pension funds. ERISA prohibits a plan administrator from borrowing money from the fund for personal use. ERISA also substantially strengthens the right of individuals to sue administrators for breach of their duty and for violations of ERISA.

The reporting and disclosure provisions of ERISA require that an employer furnish employees and participants with various kinds of information, including substantial detail about the plan. Request a copy of a Summary Plan Description from your employer or plan administrator, and ask them for more information.

Q. If a plan participant dies before his or her spouse, can the spouse still collect a pension?

A. Generally, yes. Under ERISA, a "joint-and-survivor" annuity is automatically in effect which provides a benefit for the spouse if the participant dies. The purchase of a joint-and-survivor annuity means lower pension payments to the participant while alive, but guarantees that a surviving spouse will receive a monthly payment after the participant's death, although it will be a reduced amount. Unless a participant and spouse specifically reject the joint-and-survivor annuity in writing, this type of payment will be received.

Q. If a participant gets divorced, does the ex-spouse get part of the pension?
A. This depends on state law. In some states, a pension can be considered to belong partly to a participant's spouse. Check state law or talk to your lawyer to determine this.

Q. What happens if an employee changes jobs before retirement?
A. Under ERISA, you are entitled to the entire amount of your *vested* benefits. All benefits not vested at the time of the job change are usually forfeited. An employee may put his vested funds in an IRA (see below) to avoid taxation, transfer the funds to the new employer's pension plan, or do otherwise. If you do not "roll them over" into an IRA or another qualified plan, they will probably be subject to income tax.

Q. What happens if my employer decides to terminate the pension fund? Is this legal?
A. Yes. Nothing in ERISA requires an employer to continue a pension fund. Unless the pension plan is part of a collective bargaining agreement, it can be eliminated. ERISA does afford some protection, however, by establishing the Pension Benefit Guaranty Corporation (PBGC), which protects certain benefits in certain types of funds. ERISA requires defined-benefit pension plans to pay insurance premiums to the PBGC. In return, the PBGC guarantees vested benefits in the fund up to a certain limit set by law. Other benefits provided by some pension funds, such as medical and disability benefits, are not guaranteed by the PBGC. Under ERISA, therefore, if you are not a participant in a defined-benefit plan, if your benefits in such a plan have not yet vested, or if your plan provides medical and disability benefits, you may not be fully protected by the PBGC.

Q. Where can one get more information about ERISA?
A. From the Department of Labor. Remember, too, that your employer must provide you with a summary plan description, which will answer many of your questions.

Q. I hear a lot about IRA's. What can you tell me about them?
A. IRA's are Individual Retirement Accounts that can be set up by employees and/or their employer. Like pension plans qualified under ERISA, they permit income to be deferred to retirement without current taxation. The Tax Reform Act of 1986 places numerous limitations on who can contribute to an IRA, and how much money can be contributed. The restrictions have made IRA's unavailable or less attractive to many. Thus, consult with a financial institution in the area that handles IRA's, an accountant or tax lawyer to determine if an IRA is suitable.

Where to Get More Information

This booklet is a basic roadmap to make you aware of the laws that govern the workplace. If you have questions about your rights and responsibilities, or if you just want more detailed information on a particular topic, the following lists will be helpful to you. If you're trying to find a federal agency, look in your local telephone directory under "United States." There will often be a listing of the nearest local office.

Discrimination

For more information about workplace discrimination and equal employment, contact your local office of the federal Equal Employment Opportunity Commission.

The address of the EEOC national office is:

Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

Your state may also have its own civil rights agency concerned with employment discrimination. The EEOC can give you the necessary information on state agencies.

If your employer is a federal contractor, you can receive more detailed information about additional requirements and affirmative action programs from:

Office of Federal Contract Compliance Programs
Employment Standards Administration
Washington, D.C. 20210

Your local chapters of the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored Persons (NAACP) are both heavily involved in discrimination issues and are able to answer many questions.

Employers who wish to avoid discrimination in their hiring process can find several helpful publications. One is "Law for Personnel Managers: How to Hire the People You Need Without Discriminating." This easy-to-read booklet details some of the pitfalls which can be avoided. It is published by:

Bureau of Law & Businesses, Inc.
114 Manhattan Street
P.O. Box 1274
Stanford, Connecticut 06904

Other useful publications for employers who wish to avoid discrimination include "A Professional and Legal Analysis of the Uniform Guidelines on Employee Selection Procedures," "Personnel Director's Legal Guide," and "Sex and Salary: A Legal and Professional Analysis of Comparable Worth." They are published by:

American Society for Personnel Administration
606 North Washington Street
Alexandria, Virginia 22314

OSHA

Questions regarding safety on the job should be directed to your regional Occupational Health and Safety Administration (OSHA) office. They will be able to answer questions and send you literature about the Act. The regional offices are listed below.

Region I (CT, ME, MA, NH, RI, VT):
16-18 North Street
1 Dock Square Building, 4th Floor
Boston, MA 02109

Region II (NY, NJ, PR, VI):
Room 3445, 1 Astor Plaza
1515 Broadway
New York, NY 10036

Region III (DE, DC, MD, PA, VA, WV):
Gateway Building, Suite 2100
3535 Market Street
Philadelphia, PA 19104

Region IV (AL, FL, GA, KY, MS, NC, SC, TN):

1375 Peachtree Street, N.E.
Suite 587
Atlanta, GA 30367

Region V (IL, IN, MI, MN, OH, WI):
320 South Dearborn Street
32nd Floor, Room 3244
Chicago, IL 60604

Region VI (AR, LA, NM, OK, TX):
555 Griffin Square, Room 602
Dallas, TX 75202

Region VII (IA, KS, MO, NE):
911 Walnut Street, Room 406
Kansas City, MO 64106

Region VIII (CO, MT, ND, SD, UT, WY):
Federal Building, Room 1554
1961 Stout Street
Denver, CO 80294

Region IX (CA, AZ, NV, HI, Guam, American Samoa,
Trust Territory of the Pacific Islands):
450 Golden Gate Avenue
Box 36017
San Francisco, CA 94102

Region X (AK, ID, OR, WA):
Federal Office Building, Room 6003
909 First Avenue
Seattle, WA 98174

"Job Safety Fundamentals" is a booklet that advises employers on how to create a safe working environment. It is available from the American Society for Personnel Administration, at the address listed on page 76.

Unions

For information on forming a union, contact:

National Labor Relations Board
1717 Penn. Ave. N.W.
Washington, D.C. 20570

The NLRB also has regional offices in most states and local offices in several cities. Check your telephone book.

Information concerning the internal affairs of a union can be obtained from:

Labor Management Services Administration
U.S. Department of Labor
Washington, D.C. 20216

The AFL-CIO is a source of information on unions and a wide variety of other matters pertaining to law in the workplace. You can obtain a listing of their publications from:

Pamphlet Division
Room 209
AFL-CIO
815 16th Street, N.W.
Washington, D.C. 20006

An employer seeking guidance on an attempt by employees to organize a union would find useful "Winning NLRB Elections: Management Strategy and Preventive Progress," published by the Practicing Law Institute, 810 Seventh Ave., NY, NY, 10019.

Unemployment Compensation

Contact the local office of your state's employment security or unemployment department or the state job service.

Social Security, Medicare and Medicaid

Your local Social Security Administration will be able to provide you with information and literature on your benefits. A good worksheet for helping you figure out your benefits is "Your New Social Security & Medicare Fact Sheet," which can be purchased from:

BNA Books
9435 Key West Avenue
Rockville, MD 20850-3397

Your state and county health and welfare offices should also have information.

Workers' Compensation

Since these programs are all administered by the individual states, write to your state department of labor.

"Analysis of Workers' Compensation Laws" shows provisions of these laws in all 50 states. It is revised annually. Order from:

Publications Fulfillment
U. S. Chamber of Commerce
1615 H St., N.W.
Washington, D.C. 20062

Pensions

For information about ERISA and your rights under a pension plan, write to:

Pension & Welfare Benefits Programs
Labor-Management Services Administration
U.S. Department of Labor
Washington, D.C. 20216

The Pension Rights Center, a private organization designed to inform employees of their rights concerning pensions, also publishes booklets that explain ERISA and other pension related topics. They can be reached at:

Pension Rights Center
1346 Connecticut Avenue N.W.
Room 1019
Washington, D.C. 20036

Wage & Hour

Contact the local Wage & Hour Division office of your local U.S. Department of Labor for information on laws that affect wages and working conditions. They have several publications available. The Bureau of National Affairs, Inc., also has available a summary of both federal and state wage and hour laws. Write for this summary at:

Attn: Customer Service
Bureau of Nat'l Affairs, Inc.
1231 25th St., N.W.
Washington, D.C. 20037

Government Publications

The federal government publishes hundreds of pamphlets concerning employment. These range from "how to" books for teenagers looking for jobs to statistics on the number of OSHA claims in a particular year. To find out if there is a pamphlet concerning your particular problem, check the government bibliographies. These bibliographies cover subjects such as employment and occupations, retirement, and civil rights, and list all the government publications available under that heading.

The following is a list of the bibliographies touching employment issues:

Handicapped—SB-37
Employment & Occupations—SB-44
Labor-Management Relations—SB-64
Women—SB-111
Workers' Compensation—SB-108
Veterans Affairs & Benefits—SB-80

Personnel Management, Guidance, & Counseling—SB-202
Civil Rights & Equal Opportunity—SB-207
Occupational Safety & Health—SB-213

These bibliographies are available without charge from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Other Publications

For a more detailed discussion of employee rights, see "The Rights of Employees" and "The Rights of Government Employees," both by the American Civil Liberties Union (ACLU) and available for under $5.00 from your local ACLU chapter. The ACLU also publishes "The Rights of Union Members," a handbook on how to form unions and your rights if you belong to a union.

Another short, easy-to-read book covering a wide range of employment issues is "The Law of the Workplace: Rights of Employers and Employees," by James W. Hunt. The book is available from the Bureau of National Affairs, 1231 25th Street, N.W., Washington, D.C. 20037.

Still Have Questions?

The law of the workplace is complex. Decisions you make and actions you take may have far-reaching consequences. It's often worthwhile to consult with a lawyer trained to deal with these legal matters. In fact, government agencies often advise people with questions to retain a lawyer to represent their unique interests. Contact your state or local bar association for information on lawyers in your area. Many of these organizations have a lawyer referral service to help you find a lawyer with the experience you need. Check the phonebook listing under "Lawyer Referral Service" or "Legal Assistance."

You and the Law Series

This booklet is part of the "You and the Law Series." The series is designed to help people understand the law.

Booklets in the series include:

- The American Lawyer: When & How to Use One (product code number 235-0001)
- Law and the Courts (product code number 235-0006)
- Law in the Workplace (product code number 235-0015)
- Law and Marriage (product code number 235-0005)
- Landlords and Tenants (product code number 235-0004)
- Your Rights Over Age 50 (product code number 235-0011)
- Consumer Credit and Bankruptcy (product code number 235-0010)

These booklets are available for $2 each for one to nine copies, $1.50 apiece for ten to ninety-nine copies, and $1 apiece for one hundred or more copies. Please add $1 for postage and handling of orders under $5, $2.50 for postage and handling of orders over $5. Order from Order Fulfillment, American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois, 60611. Please specify product code number of the booklets you wish to order.

The "You and the Law Series" is one of the many programs and publications of the American Bar Association's Public Education Division. The Division's conferences, films, newsletters, and other outreach activities are designed to make the law more understandable to the American public. For more information about any Division activity, contact the Public Education Division, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611, (312) 988-5725.